# ASSOCIATION OF CONCERNED TAXPAYERS

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June 21, 2005

Councilwoman Donna Frye
Chair, The Committee on Government Efficiency and Openness
c/o Kevin Smith, Council Committee Consultant
202 C Street, 3rd Floor
San Diego, CA 92101

Re: Implementation of Charter Section 225

Dear Councilwoman Frye,

Taking the necessary steps to finally implement the provisions of Charter Section 225 will materially assist both the public and government officials in achieving honest and open government.

For the public the eventual implementation of Charter Section 225 will have several immediate benefits.

- The public will for the first time have access to the names and to relevant and current information regarding the nature of private interests seeking to engage in business with the City.

- The public will be able to examine financial disclosures by public officials, elected and appointed, to determine if conflicts of interest may exist regarding private parties seeking to engage in business with the City.

- The public will be able from time to time to examine campaign disclosures by elected officials to analyze contributions by taking into consideration whether contributors have direct or indirect financial interests in transactions with the City.

- The public will be able to make inquiry from public records regarding the backgrounds and history of private interests seeking to do business with the City.

- The public will be able to determine the extent of economic activity any particular private party has engaged in with the City to the extent those transactions are covered by Charter Section 225.

Government officials will also enjoy immediate benefits from the implementation of Charter Section 225.

- Officials will know the names and the economic interests with whom negotiations are being conducted by the City.

- Officials will be better able to determine if there are economic interests they are affecting that might create conflicts of interest, e.g., under Charter Section 94, or under the Political Reform Act, or under Gov. Code §1090.[1]

- Elected officials will be better able to determine if proposed financial activities involve campaign contributors.

- Officials will be able to conduct investigations into the backgrounds and histories of those private parties proposing to do business with the City.

- Audits by the Ethics Commission will be facilitated.

These benefits were in part identified in the ballot argument presented in favor of the enactment of Charter Section 225 by the voters in 1992, to which there was no argument in opposition.

ARGUMENT IN FAVOR OF PROPOSITION E[2]

> Would you enter into a business agreement with someone you didn't know? Or even worse, perhaps not know his or her name?
>
> Of course not.
>
> But far too often the San Diego City Council is forced into just that kind of predicament. Loopholes in the system allow anonymous "limited partners" to potentially receive millions in taxpayers dollars without the Council having the benefit of knowing who the partners are, or exactly what they do with the money.

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[1] For a recent discussion of the burden of investigation that rests directly on the shoulders of elected officials, see the copy of the Chapman decision that is attached. Please note that this decision is not yet final.

[2] Election held June 2, 1992.

> San Diegans have a right to know how, and with whom, their tax dollars are being spent.
>
> This charter amendment gives the Mayor and City Council the right to know the identities and backgrounds of persons wanting to do business with the city.
>
> Please give the Council the tools it needs to protect taxpayers' money. Vote Yes on E!
>
> Maureen O'Connor, Mayor
> Valerie Stallings,[3] Councilmember, District 6

This ballot argument and the benefits accruing to both the public and government officials flows from various provisions of Charter Section 225, the language of which reads as follows:

> Section 225. Mandatory Disclosure Of Business Interests.
>
> No right, title or interest in the City's real or personal property, nor any right, title or interest arising out of a contract, or lease, may be granted or bargained pursuant to the City's general municipal powers or otherwise, nor any franchise, right or privilege may be granted pursuant to Section 103 or 103.1 of this Charter, unless the person applying or bargaining therefor makes a full and complete disclosure of the name and identity of any and all persons directly or indirectly involved in the application or proposed transaction and the precise nature of all interests of all persons therein.
>
> Any transfer of rights, privileges or obligations arising from a franchise, right or privilege granted under Charter Section 103 or 103.1, or any transfer of any right, title or interest in the City's real or personal property, or any right, title or interest arising out of a contract, or lease, which may be granted or bargained pursuant to the City's general municipal powers or otherwise, shall also require a full and complete disclosure as set forth above.
>
> Failure to fully disclose all of the information enumerated above shall be grounds for denial of any application or proposed transaction or transfer and may result in forfeiture of any and all rights and privileges that have been granted heretofore.

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[3] It is perhaps ironic that Stallings in 1999 resigned and pled guilty, among other crimes, to criminal conflicts of interest. A copy of the complaint and Stallings admissions to her criminal conduct is attached.

> For purposes of this Charter section, the term "person" means any natural person, joint venture, joint stock company, partnership, association, firm, club, company, corporation, business trust, organization or entity. (Voted 06-02-92; effective 07-13-92.)

Several examples may well help explain the purposes to be served and the scope of the mandates found in Charter Section 225.

My understanding of the history of Charter Section 225 is that the interest in its enactment arose as a consequence of two incidents occurring while I was serving on the City Council (1987–1991). The first incident arose from the refusal of Housing Commission staff to respond to a question I raised at a Housing Authority meeting at which staff was proposing that the Authority purchase two apartment complexes at a purported cost of approximately $40 million. I asked the simple question of staff of the name of the persons or entities from whom the Authority would be purchasing the properties. I was told by staff that that information was none of my business. When I pointed out, among other concerns, that I needed to know this information to determine if I had possible financial conflicts of interest, staff remained adamant that they would not provide the information. Fortunately, Mayor O'Connor intervened; and, as is said, the rest is history. Some of that history is set out in several documents which are attached.

A second incident that gave rise to an interest in the need for Charter Section 225 occurred when the Mayor, Councilwoman Wolfsheimer, and I were all blindsided when we voted to approve a management review of the propriety of a bidding process conducted by the San Diego Data Processing Corporation. It was subsequently determined that our votes potentially affected GTE Corporation (a conclusion I continue to dispute) in which the three of us owned either stock or bonds. Copies of several documents regarding that matter are attached.

These two incidents certainly made it clear to me and, quite obviously, also made it clear to Mayor O'Connor that changes in the law were required in order that financial interests coming before the City Council were known to elected officials as well, of course, to the public.

Unfortunately, subsequent to the enactment of Charter Section 225, no effort has ever been made, to my knowledge, by the City Attorney or even by the Ethics Commission (created subsequent to the adoption of Charter Section 225) or by the City Manager to implement this Charter Section. Moreover, the courts have determined that citizens currently have no legal authority to themselves enforce the provisions of the Charter section.

Consequently, since the adoption of Charter Section 225 in 1992 and continuing through today, none of its provisions have been implemented and, in fact, the mandates of the section are ignored as though the section had never been adopted by the voters.

The failure of implement Charter Section 225 has over the years deprived the public and elected officials of important information concerning persons and entities doing hundreds of millions of dollars of business with the City. Let me give one of the significant examples.

Starting in 1994 the City of San Diego began negotiations with John Moores concerning the City's financial arrangements with the San Diego Padres. Since that time I have personally been told by government officials, upon making inquiry, that the ownership interests in the Padres was well known as being limited to the Moores family. As it turns out those representations may not have been correct. Moreover, those representations do not reflect either a formal compliance with Charter Section 225 or even reflect informal compliance because the representations do not account for all indirect financial interests, "indirect" interests being specifically included within the scope of Charter Section 225.

Attached are a number of documents relating to public discussions, etc., over the years regarding some of the direct and indirect financial interests in connection with the San Diego Padres that should, in my opinion, have been disclosed by the City as required by Charter Section 225. These documents suggest that full disclosure to the City by the Padres has not been made over the years. That could be important because any failure of the Padres to have disclosed interests, particularly were it to be the case that government officials have been materially misled, would under the authority of Charter Section 225 appear to permit the City Council to cause the forfeiture or to otherwise void agreements with the Padres tainted by any violations of Charter Section 225 – should such violations be determined by the City Council to have occurred.

In this regard, particularly as regards various occasions over the last decade when there has been substantial public opposition to financial dealings between the City and the Padres, the public and government officials may have been deprived of important information regarding those people or entities which had economic interests at stake.

The implementation of Charter Section 225 is critical to the proper enforcement of conflict of interest laws such as Charter Section 94 and Gov. Code §1090. The failure to properly implement Charter Section 225 may well have contributed in a substantial manner to the current problems faced by government officials regarding conflicts of interest involving the City pension program. It is even possible that all appearances of conflicts of interest in dealing with pension matters would have been readily avoided had the obvious intent and reach of Charter Section 225 been implemented.

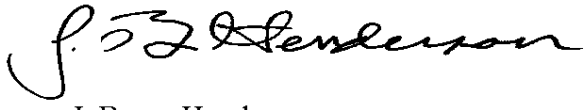
Hopefully, the various attachments and the discussion in this letter and at the hearing will make it clear that the full scope of Charter Section 225's coverage of financial interests, that is, direct and indirect interests, including, e.g., interests in corporations, interests in trusts, and interests of officers and key employees of those seeking financial transactions with the City, need to be included in the implementation procedures, rules and regulations.

While implementation of Charter Section 225 would be unlikely, of course, to avoid problems created for our City by the likes of Valerie Stallings, implementation would substantially assist the public in monitoring for conflicts of interest as well as assist those officials who constitute the rule, and not thankfully the exception, by their daily efforts seeking to avoid even the appearance of impropriety.

Finally, in providing for implementation of Charter Section 225, an important issue that should be addressed is legislation that would specifically empower members of the public to file actions in the Superior Court to enforce provisions of Charter Section 225.

The need is obvious, the time has come. Charter Section 225 must finally be implemented without delay.

Sincerely,



J. Bruce Henderson

Encl:
1. Chapman decision filed June 15, 2005.
2. Criminal complaint naming Valerie Stallings dated January 29, 2001.
3. City Attorney report dated October 15, 1990, regarding Housing Authority.
4. Editorials 1990, 1991.
5. City Attorney June 5, 1989, regarding GTE.
6. City Attorney June 19, 1989, regarding GTE.
7. Port of San Diego document August 2004.
8. San Diego Reader letter February 27, 2000
9. San Diego Reader article September 14, 2000.
10. San Diego Reader article May 3, 2001.

Filed 6/15/05

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| DAVID R. CHAPMAN, et al.,<br>Petitioners,<br>v.<br>SUPERIOR COURT,<br>Respondent;<br>DAVID MALCOLM,<br>Real Party in Interest. | D045374<br><br>(Super. Ct. No. GIC818347) |

Proceedings in mandate after the superior court denied defense motion for summary judgment, John S. Meyer, Judge. Petition granted.

Duane E. Bennett; Richards, Watson & Gershon, Darold D. Pieper, Gregory M. Kunert; Coughlan, Semmer & Lipman, R.J. Coughlan, Jr., Cathleen G. Fitch and Earll M. Pott for Petitioners.

Jennifer B. Henning for California State Association of Counties as Amicus Curiae on behalf of Petitioners.

Manuela Albuquerque for The League of California Cities as Amicus Curiae on behalf of Petitioner, the San Diego Port District.

No appearance for Respondent.

Stanford & Associates, Dan L. Stanford, Jora J. Zulauf; Law office of Charles Sevilla, Charles M. Sevilla for Real Party in Interest.

Government Code[1] section 1090 prohibits an officeholder from having a financial interest in any contract made by the public agency of which he or she is a member. Section 1090 is intended to protect the public agency's interests and those of its constituency by assuring undivided loyalty and allegiance, removing direct and indirect influence of an interested officer and discouraging dishonesty. (*Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655, 659-660 (*Thorpe*).)

In an underlying criminal matter, David Malcolm, a former member of the Board of Commissioners (Board) of the San Diego Unified Port District (Port District), pleaded guilty to violating section 1090 while on the Board. We hold here that as a matter of public policy, Malcolm may not maintain this legal malpractice action against the Port District, under a respondeat superior theory, and its former counsel, David Chapman, based on Chapman's advice to Malcolm that allegedly caused Malcolm's damages arising from the criminal matter. As there is no triable issue of material fact requiring trial, the Port District and Chapman are entitled to summary judgment. Accordingly, we grant the petition.

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1 Statutory references are to the Government Code except when otherwise specified.

## FACTUAL AND PROCEDURAL BACKGROUND

In January 1995 Malcolm was appointed to the Board.

In November 1998 the Port District, San Diego Gas and Electric (SDG&E) and Duke Energy Power Services (Duke) entered into a memorandum of understanding (MOU) under which the Port District would purchase SDG&E's South Bay Power Plant, located in Chula Vista on property under the Port District's jurisdiction, for $110 million. Further, under the MOU Duke would lease and operate the plant for 10 years at a rent of at least $115 million and pay the costs of decommissioning the plant at the end of the lease term. In December 1998 the Board authorized the Port District's acquisition of the South Bay Power Plant by approving several agreements with SDG&E and Duke.

Chapman was the Port District's in-house legal counsel at the relevant time. After execution of the MOU, Malcolm told Chapman he "thought . . . the South Bay Power Plant deal could be replicated around the country," and he planned to enter into a personal business relationship with Duke. Malcolm also told Chapman he wanted to retain Jeffrey Heintz, an attorney who assisted the Port District in acquiring the South Bay Power Plant. Chapman advised Malcolm he had no problem with Malcolm's use of Heintz, and when Malcolm made a deal with Duke he must abstain from voting on any Port District issue involving Duke and disclose any income from Duke on his conflict of interest forms. Chapman did not tell Malcolm about section 1090, that he was not providing Malcolm with legal advice, that Malcolm should consult another attorney, or that Chapman needed any further information or to see any contract Malcolm entered into with Duke.

In January 1999, after speaking with Chapman, Malcolm formed a company called Public Benefit Power (PBP) with the purpose of entering into transactions with Duke and communities that wanted to decommission aging power plants. Malcolm, who was one of PBP's three owners, sought to acquire the land on which power plants were situated and make a profit by selling or developing the land after the plants were decommissioned.

In April 1999 Malcolm told Chapman he and Duke had entered into a written contract to attempt to acquire a power plant. Thereafter, Malcolm recused himself from any Port District votes concerning Duke.

In May 2000, however, the arrangement changed from one of looking for business opportunities with Duke to one of consulting. Duke and PBP entered into a written contract requiring Duke to pay PBP $20,000 per month for Malcolm's services concerning modernization plans *for the South Bay Power Plant* and "similar generating facilities" throughout the country, and a one-time bonus of 1 1/2 percent on any funding Malcolm secured on Duke's behalf for the construction of a modernized plant *in the South Bay*.

The contract noted Malcolm "has substantial experience and knowledge with respect to political and local issues relevant to [Duke's] electric generating facility known as the South Bay plant, . . . and to similar generating facilities throughout the United States." Additionally, the contract contained a conflict of interest clause that prohibited Malcolm from advising, counseling or otherwise assisting any competitor or potential competitor of Duke, including the Port District.

Malcolm informed Chapman about the new arrangement with Duke and that he would be earning "a six-figure number." Chapman again told Malcolm he was required to divulge payments from Duke and abstain from voting on any Port District matter involving Duke.

Beginning in July 2000, Malcolm advised Duke it could benefit from the expansion of an existing "Enterprise Zone" to include the South Bay Power Plant.[2] Malcolm wrote to Duke that "[w]ith soaring utility costs in San Diego, the environment to construct new facilities has NEVER been better. Everyone is saying the only way to lower the utility bills is to build new facilities. With the present outrage over utility bills, it seems Duke would be well served to bring additional focus to the South Bay Plant." Malcolm also solicited political support for this endeavor from officials in San Diego and Chula Vista.

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2 The Government Code contains the Enterprise Zone Act (§ 7070 et seq.), which is intended to promote through incentives the development, stability and expansion of private business, industry and commerce in areas that are economically depressed because of lack of investment by the private sector. (§ 7071, subds. (a), (b).) "Enterprise zone" is defined as "any area within a city, county, or city and county that is designated as such by the [Department of Housing and Community Development] in accordance with Section 7073." (§ 7072, subd. (d).) "Each local governmental entity of each city, county, or city and county that has jurisdiction of an enterprise zone shall approve, by resolution or ordinance, the boundaries of its targeted employment area." (§ 7072, subd. (h).) Incentives include, but are not limited to, the "suspension or relaxation of locally originated or modified building codes, zoning laws, general development plans, or rent controls"; the "elimination or reduction of fees for applications, permits, and local government services"; the "establishment of a streamlined permit process"; the "elimination or reduction of construction taxes or business license taxes," and the "provision or expansion of infrastructure." (§ 7073, subd. (b)(2)(A)-(C),(3) & (4)(A).)

In a November 30, 2000 memorandum from the Port District's executive director, Dennis Bouey, to the Board, he advised that "the City of Chula Vista and BF Goodrich have asked the Port [District] to financially support their efforts to expand the San Ysidro/Otay Mesa . . . Enterprise Zone . . . including 402.1 acres of Port [District] tidelands. This [Enterprise Zone] expires in January 2007, unless the legislature amends the current law. The issue is whether the Port [District] should contribute $292,425 over the next 6.5 years when development of the former BF Goodrich and Pond 20 [Port District tenants] properties may not occur soon enough to take full advantage of [the Enterprise Zone's] tax benefits." Bouey noted the South Bay Power Plant would be in the expanded Enterprise Zone, and businesses within it "are eligible for substantial tax credits and benefits that directly affect a business' tax liability." The City of Chula Vista sought the $292,425 to share in the cost of hiring one additional full-time employee to manage the expanded area of the Enterprise Zone.

A proposed MOU with the City of Chula Vista regarding the Port District's provision of funds for the expansion of the Enterprise Zone was on the agenda for the Board's December 12, 2000 meeting. The Board approved an MOU, and the minutes note Malcolm was excused from the vote.

On December 18, 2001, Chapman wrote a memorandum to the Board regarding the contract between Duke and PBP, which had been revealed to some Commissioners in conjunction with a third party lawsuit against Malcolm. The memorandum was marked privileged and confidential as an attorney-client communication. Chapman wrote: "I have previously advised you . . . that I was aware of no facts which suggested that

Commissioner Malcolm's business arrangement with Duke violated any law, specifically including any conflict of interest law governing the conduct of Port [District] Commissioners. Having now seen the Consulting Agreement, that remains my view. The law does not prohibit conflicts of interest . . . . Rather, the law requires that certain interests be disclosed and that a public official not participate in matters where he or she may have a conflict of interest. [¶] Without question, the Consulting Agreement gives rise to a conflict of interest for Commissioner Malcolm in matters involving the Port District and Duke. To the best of my knowledge, in recognition of that conflict of interest, Commissioner Malcolm has met his legal obligation to abstain from any Port District matters involving or affecting Duke."

The *San Diego Union-Tribune* obtained a copy of Chapman's memorandum, and in a December 28, 2001 article it revealed the contract between Duke and PBP. The article stated that "[a]t the height of the energy crisis, Port Commissioner David Malcolm was being paid $20,000 a month by Duke . . . under a contract that required him to put the power company's interests ahead of all others, including those of the Port District," and "[c]ritics say Malcolm breached the public trust and should resign from the Port Commission." The following month, Malcolm resigned from the Board.

In the spring of 2003 Malcolm learned the San Diego County District Attorney (District Attorney) was contemplating multiple charges against him, including attempted perjury, two section 1090 violations and misappropriation of funds, and that a grand jury investigation was underway. Malcolm negotiated a deal with the District Attorney in

which he would plead guilty to one count of violating section 1090, a felony, in exchange for its agreement to not pursue other charges.

On April 30, 2003, the District Attorney charged Malcolm with violating section 1090 by "becoming financially interested in the contract between the . . . Port District and City of Chula Vista to expand the enterprise zone." The same date, he pleaded guilty to the charge and the parties stipulated the plea would resolve all pending District Attorney investigations. Malcolm's plea states: "On May 22, 2000, I became a party to a consulting contract with Duke . . . . Thereafter, on December 12, 2000, an item expanding the Enterprise Zone, that could benefit Duke, came before the Commission. Although I did not vote on the project, under Government Code [section] 1090 I had a financial interest and therefore abstention was not enough and I should have resigned my position as a Port Commissioner." The court sentenced Malcolm to three years of probation and 120 days of work furlough, imposed a $1,000 fine under Government Code section 1090 and a $10,000 fine under Penal Code section 1202.4, subdivision (b) and ordered him to pay the District Attorney $249,000 in restitution.

In September 2003 Malcolm sued Chapman and the Port District for legal malpractice.[3] The complaint alleges Chapman wrongfully failed to advise Malcolm of

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[3] Under Government Code sections 825, subdivision (a), and 995 a public agency is required to defend and indemnify an employee against claims for injuries arising out of an act or omission occurring within the scope of his or her employment. The complaint also included a breach of fiduciary duty cause of action against Chapman, but the court granted his special motion to strike it under Code of Civil Procedure section 426.16, known as the anti-SLAPP statute. That cause of action is not at issue in this proceeding.

section 1090 and that his arrangement with Duke required him to resign from the Board rather than merely disclose income from Duke and abstain from voting on Port District matters involving Duke. Malcolm seeks to recover damages resulting from his criminal prosecution, such as lost business opportunities, attorney fees and emotional distress damages.

The Port District and Chapman moved for summary judgment, arguing Chapman had no attorney-client relationship with Malcolm as a matter of law, and in any event, maintenance of the cause of action violates public policy as section 1090 is intended to protect public agencies from officeholders' self-dealing. In a tentative ruling the court denied the motion, explaining "the cases addressing the issue of whether an attorney-client relationship is created between a public entity officer and the public entity attorney, when advice is sought and given, are confusing and difficult to reconcile." The court found underlying triable issues of fact regarding whether Chapman and Malcolm had an attorney-client relationship. The court rejected the public policy argument, finding the "public should be able to trust that its public attorney would provide proper legal advice so as to avoid the scandal as well as the expense of a criminal prosecution. These are issues of fact and may be more appropriate as argument at trial. Defendants have not cited any authority that holds that this public policy bars plaintiff's claim as a matter of law." After oral argument, the court affirmed its tentative ruling.

## DISCUSSION

### I

### *Standard of Review*

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant satisfies this burden by showing " 'one or more elements of' the 'cause of action' in question 'cannot be established,' or that 'there is a complete defense' " to that cause of action. (*Ibid.*) If the defendant meets his or her initial burden, "the opposing party is then subjected to a burden of production of his [or her] own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*)

"De novo review is used to determine whether, as a matter of law, summary judgment was appropriately granted." (*Camarillo v. Vaage* (2003) 105 Cal.App.4th 552, 560.) We strictly construe the moving party's affidavits and liberally construe the opposing party's affidavits. (*Fraizer v. Velkura* (2001) 91 Cal.App.4th 942, 945.) " ' "We accept as undisputed facts only those portions of the moving party's evidence that are not contradicted by the opposing party's evidence. . . . In other words, the facts alleged in the evidence of the party opposing summary judgment and the reasonable inferences therefrom must be accepted as true." [Citation.]' " (*Ibid.*)

II

*Demurrer*

Malcolm demurs to the petition on the ground it does not sufficiently set forth the undisputed facts supporting summary judgment in favor of the Port District and Chapman. (Code Civ. Proc., § 1089; Cal. Rules of Court, rule 56(h)(1).) A proceeding in mandamus is generally subject to the general rules of pleading applicable to civil actions. (*Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573, citing Code Civ. Proc., § 1109.) "Therefore, it is necessary for the petition to allege specific facts showing entitlement to relief . . . . If such facts are not alleged, the petition is subject to general demurrer [citation] or the court is justified in denying the petition out of hand." (*Gong v. City of Fremont, supra,* at p. 573.)

The Port District and Chapman concede "the absence of a traditional statement of facts" in the petition. They contend the petition's incorporation of the parties' separate statements of undisputed facts and hundreds of pages of accompanying exhibits satisfied their obligation. That is, of course, incorrect. "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. It is entitled to the assistance of counsel." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 594, p. 627.)

We nonetheless overrule the demurrer. In their first reply to Malcolm's response to the petition, the Port District and Chapman set forth the specific facts of the case, and despite an inadequate rendition of undisputed facts in the petition Malcolm was able to file two briefs fully addressing the issues.

III

*Attorney-Client Relationship*

The Port District and Chapman contend that as a matter of law a public agency's counsel and an agency board member cannot have an attorney-client relationship. They rely on *Ward v. Superior Court* (1977) 70 Cal.App.3d 23, in which the court held there was no attorney-client relationship between counsel for the County of Los Angeles and the county assessor, and thus counsel was not disqualified from representing a county board member and county employees in litigation against them by the assessor. The court found the undisputed evidence showed that any legal advice counsel gave the assessor arose from his obligation to advise county officers in matters pertaining to their duties, and counsel's only client was the county. (*Id.* at pp. 28, 32; see also *Civil Service Com. v. Superior Court* (1984) 163 Cal.App.3d 70, 78 [this court noted "the general proposition that a public attorney's advising of a constituent public agency does not give rise to an attorney-client relationship separate and distinct from the attorney's relationship to the overall governmental entity of which the agency is a part"].)

Malcolm counters that there are underlying factual issues regarding the existence of an attorney-client relationship. " 'The determination of an existence of an attorney-client relationship . . . is one of law. "However where there is a conflict in the evidence the factual basis for the determination must first be determined, and it is for the trial court to evaluate the evidence. [Citation.]" [Citation.]' " (*Ward v. Superior Court*, *supra*, 70 Cal.App.3d at p. 31.)

Malcolm relies on Chapman's deposition testimony that the Port District expected him to "be available to individual commissioners to give them assistance in addressing, among other things, conflict of interest issues." Further, Malcolm presented evidence that Chapman encouraged commissioners to come to him with any conflict of interest questions. In a July 9, 1996 memorandum Chapman provided commissioners with copies of the "Political Reform Act for insertion in the Conflict of Interest binders I provided to you some time ago." Chapman stated that "[w]hile the Act may be a helpful resource, I encourage you to contact . . . me . . . with any specific questions you may have." Chapman also wrote, "[s]ituations involving conflicts of interest will arise from time to time, and each commission member should feel free to consult this memorandum and should also contact the Port Attorney's office for a thorough analysis of any given situation." In a December 2, 1998 memorandum Chapman briefly discussed section 1090 and asked commissioners to contact him with any specific questions on that statute.

In a declaration, Malcolm stated he approached Chapman numerous times with various conflict of interest issues, and Chapman regularly provided advice to him. When Malcolm asked Chapman about the Duke situation, Chapman told him that once a relationship was formed he must disclose all compensation received from the deal and recuse himself from any vote involving Duke. Chapman never told Malcolm he was not providing legal advice, or that Malcolm should not rely on his advice or consult another attorney. Moreover, there is evidence Chapman knew Malcolm was following his advice on the Duke matter. During meetings of the Board, Malcolm would occasionally ask

Chapman whether he should recuse himself from voting on a Duke matter, and Chapman would agree that he should.

We seriously question whether the attorney-client issue here is susceptible to resolution as a legal matter. The cases the Port District and Chapman rely on are not factually on point, and a "decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985; *Chevron U.S.A., Inc. v. Workers' Comp. Appeals Bd.* (1999) 19 Cal.4th 1182, 1195.) Moreover, an attorney's conflict in representing the interests of two parties and his or her actual creation of an attorney-client relationship with both parties are ordinarily different issues.

We are not, however, required to resolve the attorney-client issue, and we express no opinion on the matter. Rather, we conclude that notwithstanding any such relationship between Chapman and Malcolm, for public policy reasons Malcolm cannot maintain this action because it is grounded on his illegal conduct.

IV

*Governing Statute*

"Section 1090 is a general prohibition against an officeholder's financial interest in a contract.[4] Section 1090 prohibits any public officers or employers from having any financial interest, direct or indirect, in any contract made by them in their official capacity or by any board or commission of which they are a member." (*Thorpe, supra,* 83 Cal.App.4th at p. 659.) The term contract is interpreted broadly under section 1090 and includes " 'the negotiations, discussions, reasoning, planning, and give and take [that] go beforehand in the making of a decision.' " (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 196.)

"Where section 1090 applies, it is an absolute bar to a board or commission entering into the prohibited contract." (*Thorpe, supra,* 83 Cal.App.4th at p. 659.) Section 1090 is intended " 'to insure absolute loyalty and undivided allegiance to the best interest of the [governmental agency] they serve and to remove all direct and indirect influence of an interested officer as well as to discourage deliberate dishonesty. [Citations.]' [Citation.] ' "The statute is thus directed not only at dishonor, but also at conduct that

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4 "Section 1090 provides: 'Members of the Legislature, state, county, district, judicial district, and city officers or employers shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. . . . [¶] As used in this article, "district" means any agency of the state formed pursuant to general law or special act, for the local performance of governmental or proprietary functions within limited boundaries.' " (*Thorpe, supra,* 83 Cal.App.4th at p. 659, fn. 2.) Section 1090 "codified the common law prohibition of public officials having a financial interest in contracts they make in their official capacities." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1230.)

tempts dishonor. . . ." ' Section 1090 is intended to avoid even ' "the appearance of impropriety." ' " (*Thorpe*, *supra*, at pp. 659-660.)

"California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations." (*Thomson v. Call* (1985) 38 Cal.3d 633, 649.) "Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council." (*Ibid.*) Further, reliance on legal counsel's advice is not a defense to a section 1090 violation. (*Id.* at p. 646; *People v. Honig* (1996) 48 Cal.App.4th 289, 347-348.)

An officeholder who "willfully" violates section 1090 "is punishable by a fine of not more than . . . $1,000, or by imprisonment in the state prison, and is forever disqualified from holding any office in this state. (§ 1097.) The term "willfully" means "the official must purposefully make a contract in which he is financially interested." (*People v. Honig*, *supra*, 48 Cal.App.4th at pp. 334, 336-338.) The requirement of willfulness "restricts the reach of this felony statute [§ 1090] to circumstances one might plausibly call wrongful intent or malum in se." (*Id.* at p. 338.)

V

*Public Policy*

For public policy reasons, courts may preclude particular types of actions. (See, e.g., *Holland v. Thacher* (1988) 199 Cal.App.3d 924, 930 [attorney sued for malpractice may not bring cross-action for indemnity against client's successor attorney]; *PPG Industries, Inc. v. Transamerica Ins. Co.* (1999) 20 Cal.4th 310, 316 [insured may not

obtain indemnity from insurer for punitive damages]; *Musser v. Provencher* (2002) 28 Cal.4th 274, 285 [legal malpractice claims are not assignable]; *Wiley v. County of San Diego* (1998) 19 Cal.4th 532, 536-537 [actual innocence is a predicate of malpractice action against criminal defense counsel].)

The parties have not cited to us any California case in which the facts are analogous to those here, and we have found none in our independent research. The Port District and Chapman rely on *Saks v. Sawtelle, Goode, Davidson & Troilo* (Tex.Ct.App.1994) 880 S.W.2d 466, 469 (*Saks*), in which former clients (Saks and Spruill) of the defendant law firm (Sawtelle) sued it and individual attorneys for malpractice "arising out of legal services rendered in connection with a loan transaction—a transaction which subsequently led to [Saks's and Spruill's] conviction on charges of bank fraud." (*Id.* at p. 467.) Saks and Spruill, through their partnership, borrowed approximately $19 million from three affiliated banks, ostensibly to fund a development project, but then diverted $5 million back to one of the banks to conceal a shortfall in the bank's assets that federal bank regulators were investigating. The Sawtelle firm assisted Saks and Spruill with the loan transaction and preparation of the loan documents. (*Id.* at p. 467.)

A jury convicted Saks and Spruill of violating federal law by participating in a scheme with bank directors to disguise the true nature of the diverted funds. (*Saks, supra,* 880 S.W.2d at pp. 467-468.) An element of the crime was knowingly devising and executing or attempting to execute a scheme of artifice to defraud a federally chartered or insured financial institution. (*Id.* at p. 468.)

Saks and Spruill consequently sued Sawtelle for malpractice, seeking damages for lost income and profits, mental suffering, damage to reputation, loss of net worth and attorney fees, all of which stemmed from their conviction. They alleged Sawtelle negligently prepared the loan documents and "*failed to inform [them] of potential criminal violations* arising from the transaction and *misrepresented the legality of the loan transaction*" to them. (*Saks, supra,* 880 S.W.2d at p. 468, italics added.) They also alleged Sawtelle's negligent advice directly caused their criminal conduct and conviction. (*Id.* at p. 469.)

The court held that as a matter of law, Saks and Spruill were precluded from maintaining the malpractice action because "public policy bars recovery for injuries arising from a knowing and willful crime." (*Saks, supra,* 880 S.W.2d at p. 470.) The court concluded that "[e]ven if Sawtelle is guilty of negligence or misrepresentation, this fact is not relevant in light of the public policy which bars [Saks and Spruill] from recovering compensation for the damages they incurred as a result of their conviction." (*Ibid.*) The court explained: " 'It may be assumed, as undisputed doctrine, that no action will lie to recover a claim for damages, if to establish it the plaintiff requires aid from an illegal transaction, or is under the necessity of showing or in any manner depending upon an illegal act to which he [or she] is a party.' " (*Id.* at p. 469.) Additionally, "[p]unishment for crime is intended to be personal and absolute; and, to accomplish the prevention of crime which is the purpose of the punishment, it is quite necessary that the person should not 'even entertain the hope of indemnity' for the offense committed . . . . To allow damages . . . suffered in consequence of [a] conviction would in tendency make

it profitable to violate the law, and oppose the principle of denying any redress for a violation of law." (*Id.* at p. 470.)

We find *Saks* analogous and persuasive. Malcolm pleaded guilty to willfully violating section 1090. (§ 1097.) " '[W]illfully,' as applied in this context, means that the official must purposefully make a contract in which he [or she] is financially interested." (*Honig, supra,* 48 Cal.App.4th at p. 334.) Willfulness denotes an element of knowledge, meaning "the official must know . . . there is a reasonable likelihood that the contract may result in a personal financial benefit to him [or her]." (*Id.* at p. 338.) Malcolm's plea establishes that when the Port District voted to expand the Enterprise Zone, he knew it would likely benefit him financially. In line with *Saks*, allegations that Chapman's negligent advice caused Malcolm to commit a crime and plead guilty are immaterial, as Malcolm cannot obtain indemnity for his willful criminal wrongdoing. Section 1090 serves as a disincentive for officers who may be tempted to take personal advantage of public office (*Thomson v. Call, supra,* 38 Cal.3d at p. 652), and the recoupment of losses attributable to a violation of the statute would undermine that salutary purpose.

In this case, public policy is even more compelling than in *Saks* because Malcolm seeks recovery from a public entity that *section 1090 is designed to protect.* "The prophylactic function of the statute is to prevent conflicts of interest from occurring." (*Thomson v. Call, supra,* 38 Cal.3d at p. 652.) In our view, allowing Malcolm to recoup from the public fisc losses he incurred as a result of his self-dealing, regardless of any negligent advice from Chapman, " ' " 'would indeed shock the public conscience, engender disrespect for courts and generally discredit the administration of justice.' " ' "

(*Wiley v. County of San Diego, supra*, 19 Cal.4th at p. 537.) "Although the public interest is served by discouraging attorney misconduct," a "court should not encourage others to commit illegal acts upon their lawyer's advice by allowing the perpetrators to believe that a suit against the attorney will allow them to obtain relief from any damage they might suffer if caught." (*Evans v. Cameron* (Wis. 1985) 360 N.W.2d 25, 29.)

Malcolm asserts Chapman gave him "expert advice on a complex legal issue," and thus he "cannot fairly be charged with knowledge that he was committing an unlawful or even a morally wrong act." He cites *Pantely v. Garris, Garris & Garris* (Mich.Ct.App. 1989) 447 N.W.2d 864, in which the court held that a client who admitted perjuring herself in a divorce action could not maintain a legal malpractice action against the attorney who told her to testify falsely. The court found the parties were in pari delicto. (*Id.* at pp. 868-869.) The court explained, "[w]e can readily envision legal matters so complex and ethical dilemmas so profound that a client could follow an attorney's advice, do wrong and still maintain suit on the basis of not being equally at fault. But perjury is not complex; and telling the truth poses no dilemma." (*Id.* at p. 868.)

Malcolm simultaneously represented the Port District and Duke, and to promote his own financial interests he expressly contracted to hold Duke's interests paramount to the Port District's interests. Yet, Malcolm remained on the Board instead of relinquishing his seat. Perhaps the wrongfulness of Malcolm's conduct was not as apparent as lying under oath, but we believe the average person would readily regard it as improper notwithstanding Chapman's inexplicable disclose and recuse advice. Section 1090 is based on " '[t]he truism that a person *cannot serve two masters simultaneously*' [citation],

which is regarded as *a 'self-evident truth, as trite and impregnable as the law of gravitation . . . .' "* (*Honig, supra*, 48 Cal.App.4th at pp. 313-314, italics added.) "In our society, people of ordinary sensibility should recognize, without the intervention of a criminal proscription, that a public official is a trustee and that it is wrong for such a trustee to engage in self-dealing, including the contingent feathering of one's own nest." (*Id.* at p. 338.)

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the superior court to vacate its October 5, 2004 order and issue a new order granting the Port District and Chapman summary judgment. The Port District and Chapman are entitled to costs in this proceeding.

CERTIFIED FOR PUBLICATION

_____

MCCONNELL, P. J.

WE CONCUR:

_____

NARES, J.

_____

O'ROURKE, J.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

VALERIE STALLINGS,
*dob 12/23/39;*
Defendant.

Criminal Case No. M821145

COMPLAINT - MISDEMEANOR

## CHARGE-SUMMARY

| Count | Charge | Issue Type | Sentence Range | Special Allegations | Allegation Effect |
|---|---|---|---|---|---|
| 1 | GC91000 STALLINGS, VALERIE | Misdemeanor | 6 Mos | | |
| 2 | GC91000 STALLINGS, VALERIE | Misdemeanor | 6 Mos | | |

The undersigned, certifying upon information and belief, that in the County of San Diego, State of California, the Defendant(s) did commit the following crime(s):

## CHARGES

COUNT 1 - FAILURE TO DISCLOSE

In or about March 1998, VALERIE STALLINGS, an elected city council person under the meaning of Government Code Section 87200, having received gifts from John J. Moores and the San Diego Padres Baseball Club in calendar year 1997 in excess of the disclosure threshold set forth in Government Code Section 87207, knowingly failed to disclose those gifts as required under Government Code Sections 87203 and 87207, in violation of Government Code, Section 91000, a misdemeanor.

COUNT 2 - FAILURE TO DISQUALIFY

From on or about October 1, 1999 to on or about December 31, 1999, VALERIE STALLINGS, a public official, made, participated in making, and attempted to use her official position to influence governmental decisions in which she knew she had a financial interest under the meaning of Government Code Section 87103(e), in violation of Government Code Sections 87100 and 91000, a misdemeanor.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT AND THAT THIS COMPLAINT, CASE NUMBER _____, CONSISTS OF 2 COUNTS.

Executed at San Diego, County of San Diego, State of California, on January 29, 2001.

COMPLAINANT

| SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO | For Court Use Only |
|---|---|
| PEOPLE vs. VALERIE STALLINGS Defendant | |
| PLEA OF GUILTY/NO CONTEST - MISDEMEANOR | Case # |
| | DA/CA/ # |

**INSTRUCTIONS: Fill out this form if you wish to plead guilty or no contest to the charges against you. Initial each applicable item only if you understand it. If you have any questions about your case, the possible sentence, or the information on this form, ask your lawyer or the judge.**

I, the defendant in the above-entitled case, personally and/or by my attorney, declare as follows:

1. Of those charges now filed against me in this case, I plead GUILTY / GUILTY/NO CONTEST to the following offenses and admit the enhancements, allegations, and prior convictions as follows: (A) 1.

| COUNT | CHARGE | ENHANCEMENT/ALLEGATION |
|---|---|---|
| ONE | Gov.Codes 87203, 87207 and 91000 | |
| TWO | Gov.Codes 87103(e), 87100 and 91000 | |
| | | |

PRIORS: (LIST ALLEGATION SECTION, CONVICTION DATE, CASE NUMBER AND CHARGE)

2. I have not been induced to enter the above plea by any promise or representation of any kind, except: (State any agreement with the prosecutor.) SEE ATTACHED ADDENDUM N/A 2.

3. I am entering a plea freely and voluntarily, without threat or fear to me or anyone closely related to me. (V) 3.

4. I understand that a plea of No Contest is the same as a plea of Guilty for all purposes. (V) 4.

5. I am sober and my judgment is not impaired. I have not consumed any drug, alcohol or narcotic within the past 24 hours. (V) 5.

**RIGHT TO A LAWYER**

6. I understand that I have the Constitutional right to be represented by a lawyer at all stages of the proceedings including sentencing. I can hire my own lawyer or the Court will appoint a lawyer for me if I cannot afford one. I understand the dangers and disadvantages of representing myself and that it is usually unwise to represent myself. (V) 6.

6a. I understand that I have the right to be present in Court to enter my plea and for sentencing. I expressly authorize my lawyer to enter this plea on my behalf, in my absence. I expressly authorize my lawyer to appear for me at sentencing. (V) 6a.

6b. I give up the right to an attorney and wish to represent myself. N/A 6b.

**CONSTITUTIONAL RIGHTS**

I understand that as to all charges, allegations and prior convictions filed against me I also have the following constitutional rights, which I now give up to enter my plea of guilty/no contest:

7. I have the right to a **speedy and public trial by jury. I now give up this right.** (V) 7.

8. I have the right to **confront and cross-examine all the witnesses** against me. **I now give up this right.** (V) 8.

9. I have the right to **remain silent** (unless I choose to testify on my own behalf). **I now give up this right.** (V) 9.

10. I have the right to **present evidence in my behalf** and to have the court subpoena my witnesses at no cost to me. **I now give up this right.** (V) 10.

**CONSEQUENCES OF PLEA OF GUILTY OR NO CONTEST**

11. I understand the possible consequences of entering a plea of Guilty/No Contest include a maximum sentence of up to 6 months/years in jail and fine(s) of up to $10,000 plus additional consequences specified in any attached addendum, and any other reasonable conditions of probation, which could be for a maximum of 3/5 years. (V) 11.

| Defendant | Case Number |
|---|---|
| VALERIE STALLINGS | |

12. I understand that in addition to any fine imposed, the law requires the Court to add penalty assessments which will Substantially increase the amount I must pay. In addition, I understand that I may be ordered to make restitution to the victim, if the offense involved a victim, or to a restitution fund. I understand that I shall be ordered to pay a mandatory restitution fine ($100 - $1,000). VS 12.

13. I understand that I may not be sentenced earlier than six (6) hours, nor later than five (5) days after my plea. I give Up this right and agree to be sentenced at this time. VS 13.

14. I understand that if I an not a citizen of the United States, a plea of Guilty or No Contest can or will result in removal or deportation, exclusion from admission to this country, denial of amnesty and denial of naturalization. N/A 14.

15. I understand that my plea of Guilty or No Contest in this case could result in revocation of my probation or parole in other cases and consecutive sentences. VS 15.

OTHER WAIVERS

16. **(Appeal rights)** I give up the right to appeal from the denial of my 1538.5 motion, issues regarding allegations of prior convictions, and any sentence within the terms herein specified. VS 16.

17. **(Harvey Waiver)** The sentencing judge may consider my prior criminal history and the entire factual background of the case, including any unfiled, dismissed, or stricken charges or allegations or cases when granting probation, ordering restitution, or imposing sentence. VS 17.

18. **(Arbuckle Waiver)** I understand that I have the right to be sentenced by the same judicial officer who accepts the plea. I hereby waive that right and agree that sentence may be imposed either by the judicial officer who accepts this plea or may be imposed by a different judicial officer. N/A 18.

PLEAS

19. I now plead Guilty/No Contest and admit the charges, convictions, and violations of probation described in paragraph #1, above, because I am guilty. I admit that on the dates charged, I *(Describe facts as to each charge and allegation)* VS 19.

SEE ATTACHED ADDENDUM

I further agree that a duly appointed Commissioner, Referee, or Temporary Judge may act as a Judge, accept this plea, impose sentence, and conduct any other post-conviction proceedings. I declare under penalty of perjury, under the laws of the State of California, that I have read, understood, and initialed each item above, and any attached addendum, and everything on the form and any attached addendum is true and correct.

Dated: Jan. 26, 2001 Defendant's Signature: Valerie Stallings

Defendant's Address: 5721 Burgener Blvd. San Diego Ca 92110
(Street) (City) (State) (Zip)

Defendant's Telephone No: ( 619 ) 275-5044

ATTORNEY'S STATEMENT

I am the attorney for the defendant in the above-entitled case. I personally read and explained to the defendant the entire contents of this plea form and any addendum thereto. I discussed all charges and possible defenses with the defendant, and the consequences of this plea. The defendant filled in and initialed each item to acknowledge his/her understanding and waivers. I observed the defendant date and sign this form and any addendum. I concur in the defendant's plea and waiver of constitutional rights.

Dated: 1-26-01 FRANK RAGAN (Print Name) Attorney for Defendant (Circle one: PD / APD / PCC / RETAINED) (Signature)

INTERPRETER'S STATEMENT (If Applicable)

I, the interpreter in this proceeding, having been duly sworn, truly translated this form, and any attached addendum, and all the questions therein to the defendant in the _____ language. The defendant indicated understanding of the contents of the form and then initialed and signed the form and any attached addendum.

Dated: 1/29/01 [redacted] (Print Name) Court Interpreter (Signature)

PROSECUTOR'S STATEMENT

The People of the State of California, plaintiff in the above-entitled criminal case, by and through its attorney concurs with the defendant's plea of Guilty/No Contest as set forth above.

Dated: 1/29/01 Thomas W. McDermott (Print Name) Deputy District Attorney/Deputy City Attorney (Signature)

COURT'S FINDING AND ORDER

The Court, having questioned the defendant/defendant's attorney concerning the defendant's plea of Guilty/No Contest and admissions of the prior convictions and allegations, if any, finds that: The defendant understands and voluntarily and intelligently waives his/her constitutional rights; the defendant's plea and admissions are freely and voluntarily made; the defendant understands the nature of the charges and the consequences of the plea and admissions; and there is a factual basis for same. The Court accepts the defendant's plea and admissions, and the defendant is convicted thereby.

Dated: _____ Judge/Commissioner/Referee of the Superior Court

ORIGINAL

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO
CENTRAL DIVISION

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA,<br>Plaintiff,<br><br>v.<br><br>VALERIE STALLINGS,<br>*dob 12/23/39;*<br>Defendant. | Criminal Case No. _____<br><br>ADDENDUM TO PLEA FORM |

I. ADDENDUM TO ITEM 2

A. Agreement Not to Prosecute

In exchange for defendant Stallings' agreement to resign her position as a San Diego City Council Member, her guilty plea in this case, and the other concessions in the plea form and this Addendum (collectively, the "Agreement"), the United States Attorney's Office for the Southern District of California and the District Attorney for the County of San Diego (collectively, the "Government") agree not to bring any state or federal charges against defendant Stallings arising out their investigation into her conduct as set forth in section II of this Addendum, or relating to her conduct during the course of the investigation, which the Government now deems closed as to defendant Stallings. The Government cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities. If requested by defendant Stallings, the Government will bring this plea agreement to the attention of other authorities, and will recommend to the California Fair Political Practices Commission that the penalties recommended herein are fair and adequate.

B. Defendant Waives Appeal and Collateral Attack

In exchange for the concessions in this Agreement, Defendant waives, to the full extent of the law, any right to appeal or collaterally attack the conviction and sentence, including any appeal or attack based on any alleged failure by prosecutors to provide information required under Brady v. Maryland, 373 U.S. 83 (1983) or Giglio v. United States, 405 U.S. 150 (1972); except that Defendant may appeal any sentence in excess of the parties' sentencing recommendations. The waivers in this section are in addition to the waivers in items 16-19 of the plea form.

C. Sentencing Recommendations

The parties will recommend that Defendant be sentenced to no period of custody or probation. The parties will request immediate sentencing.

The parties will recommend a fine of $5,000 per count, for a total of $10,000, such amount to be paid at sentencing.

Defendant understands that the sentence and fine are within the sole discretion of the sentencing judge, and that the parties' recommendations are not binding on the court.

D. Subsequent Crimes or Breach of the Agreement Will Permit the Government to Set Aside the Agreement

This agreement is based on the understanding that Defendant has committed no criminal conduct since January 1, 2001, and that Defendant will commit no additional criminal conduct before sentencing. This agreement is also based on the understanding that Defendant will resign her position as a City Council Member and will enter a guilty plea and be sentenced according to the terms of the Agreement. If defendant has engaged in or engages in additional criminal conduct during the above-mentioned period, or breaches any of the terms of this agreement, or moves to withdraw her guilty plea, the Government will not be bound by this agreement and may recommend any lawful sentence, or, at its option, move to set aside the plea. In addition, if for any other reason the plea or conviction is set aside or vacated, the Government may prosecute defendant Stallings for any applicable federal or state criminal violation.

E. Entire Agreement

This Agreement embodies the entire agreement between the parties and supersedes any other agreement, written or oral.

F. Modification of Agreement Must Be in Writing

No modification of this Agreement shall be effective unless in writing signed by all parties.

G. Defendant Satisfied With Counsel

Defendant is satisfied that defense counsel has been competent and effective in representing Defendant.

II. ADDENDUM TO ITEM 19

A. Stipulated Facts

1. Defendant Valerie Stallings is a member of the San Diego, California City Council who was first elected in 1991. Stallings represented San Diego's Sixth Council District communities of Clairemont, Mission Valley, and Serra Mesa, and portions of Linda Vista, Kearny Mesa and Pacific Beach.

2. John J. Moores is and has been the Chairman and majority owner (through a limited partnership) of the San Diego Padres Baseball Club (the "Padres") since late 1994. Defendant Stallings and Moores became friends shortly after Moores purchased the Padres.

3. The Padres have had matters before the City Council on a regular basis. Defendant Stallings participated in votes concerning the Padres prior to her voluntary recusal in June 2000.

*California Disclosure Requirements, Gift Limits, and Stallings' Failure to Report*

4. As an elected official, defendant Stallings was subject to The Political Reform Act of 1974 (the "Act"), Title 9 of the California Government Code.

5. Section 87203 of the California Government Code requires public officials to annually disclose their assets and income. These disclosures are made on a Statement of Economic Interests ("SEI") form which must be filed each calendar year. SEI forms are public documents. The reporting public official must "certify under penalty of perjury under the laws of the State of California" that the official "used all reasonable diligence in preparing" the SEI form, and that information contained in the SEI form is "true and correct."

6. Under section 87207 of the California Government Code, gifts aggregating $50 or more from a single source in a calendar year are classified as income that must be reported. The amount of the gift, as well as the identity of the donor, must be included in Schedule E (entitled "Income – Gifts") to the SEI form.

7. Section 89503 of the California Government Code prohibits elected public officials from accepting gifts with a value over a certain amount in a calendar year. The limit was two hundred fifty dollars ($250) in 1996, two hundred ninety dollars ($290) in 1997 and 1998, and three hundred dollars ($300) in 1999, for any gift or gifts from any single source in any calendar year.

8. During the period between 1996 and 1999, Moores and the Padres gave items to defendant Stallings and members of her family in excess of the limits set forth above. Stallings was prohibited from accepting many of the items because their value exceeded the California gift limit.

a. In April of 1996, defendant Stallings desired to have her daughter (who lived in Kansas) visit her in San Diego while Stallings underwent unexpected cancer surgery. Stallings instructed her daughter to contact Moores to arrange for an airline ticket. Moores purchased a $917 round trip ticket for the daughter's travel from Kansas to San Diego.

b. In April of 1996, defendant Stallings desired to have her sister (who lived in Kansas) visit her in San Diego while Stallings underwent unexpected cancer surgery. Stallings instructed her brother-in-law that Moores would arrange for an airline ticket. Moores purchased a $792 round trip ticket for the sister's travel from Kansas to San Diego.

c. In May of 1996, defendant Stallings desired to have her sister (who lived in Kansas) visit her in San Diego while Stallings underwent chemotherapy. Moores purchased a $579 round trip ticket for the sister's travel from Kansas to San Diego.

d. In July of 1996, defendant Stallings desired to have her mother (who lived in

Florida) visit her in San Diego. Defendant Stallings arranged with the Padres for Stallings' mother to travel at no expense one way from Florida to San Diego on the Padres team plane during a regularly scheduled team flight.

e. On August 2, 1996, Moores offered and arranged to have defendant Stallings' mother driven by limousine from Stallings' San Diego home to Los Angeles.

f. On April 18, 1997, defendant Stallings asked to use a Moores' vehicle to travel to Moores' guest property in Carmel, California. Moores gave Stallings access to his 1991 Mercedes station wagon which she used for five days.

g. From April 19 through April 22, 1997, defendant Stallings stayed at Moores' guest property in Carmel, California, at a time when neither Moores nor any member of Moores' family was present. A caretaker employed by Moores provided groceries for Stallings' stay.

h. On April 20, 1997, defendant Stallings and a friend had brunch at Stillwater Grill at the Beach Club and charged the $41.01 expense to Moores' account at the Pebble Beach country club.

i. In about May of 1997, defendant Stallings received from Moores a limited edition (one of fifty made) Padres baseball holder display which contained five baseballs autographed by four Padres players (Tony Gwynn, Ken Caminitti, Steve Finley, and Trevor Hoffman, each of whom had received an award or special recognition in the 1996 season) and the Padres coach (Bruce Bochy, who had been named coach of the year in 1996). The cost to the Padres to have the baseball holder made was approximately $240 (which does not include the fair market value of the autographed baseballs contained in the display).

j. In July of 1997, defendant Stallings desired to have her mother (who lived in Florida) visit her in San Diego. Defendant Stallings arranged with the Padres for Stallings' mother to travel at no expense one way from Florida to San Diego on the Padres team plane during a regularly scheduled flight.

k. On or about February 8, 1999, defendant Stallings sought the opportunity to purchase stock in the initial public offering of Neon Systems, Inc. ("Neon") a Sugarland, Texas based business software company. Neon has never contracted with or done business with the City of San Diego. Moores was the Chairman of the Board of Directors of Neon and had a significant beneficial ownership interest in the company. Through Moores' intervention, Stallings was allowed to purchase 350 shares of Neon through Neon's "Friends and Family" program, at the initial public offering price of $15 per share. The lowest price available on Neon's first trading day (March 5, 1999) was $20.75 per share.

l. On March 11, 1999, Stallings sold 75 of her Neon shares at $39.9375 per share, realizing a gross profit of approximately $24.9375 per share, and a total pre-tax profit of approximately $1,869.75. On March 31, 1999, immediately after consulting with Moores, Stallings sold her remaining 275 shares at $49.15 per share, realizing a gross profit of approximately $34.15 per share, and a total pre-tax profit of approximately $9,391.25.

m. In or about June 1999, Moores and defendant Stallings went to lunch and then shopping for an answering machine. Defendant Stallings received from Moores an answering machine worth approximately $50, which Moores paid for in cash.

n. On August 31, 1999, defendant Stallings, accompanied by Moores, went shopping for a camera for Stallings. Stallings paid $728 cash for a Nikon camera and accessories. Moores provided Stallings with approximately $200 of the purchase price, in cash.

o. In November of 1999, defendant Stallings talked with Moores about reinvesting in Neon. Stallings told her brother-in-law that Moores advised her that the stock was then undervalued in his opinion (it was trading in low $20's), and should go back up to around $40. On November 26, 1999, Stallings purchased 425 shares of Neon through Moores' broker in Baltimore, Maryland, on the open market, at a price of $23.25 per share. On December 31, 1999, Neon's stock closed at $39.25 per share. During early 2000, the stock went above $40 per share. Defendant Stallings, however, continued to hold the shares until January 23, 2001, when she sold them for $7.1875 per share, realizing a loss of $16.06 per share, and a total pre-tax loss of approximately $6932.67.

p. Numerous times during each of the years 1996 to 2000, defendant Stallings accepted lunches and dinners paid for by Moores, and food and beverages at his owners box during Padres games.

q. At various times from 1996 to 2000, defendant Stallings received from Moores and the Padres souvenirs and baseball memorabilia.

9. Defendant Stallings did not disclose any of the above-listed items on Schedule E ("Income-Gifts") of her 1996-99 SEI forms. Defendant Stallings did disclose her Neon investments in Schedule A-1 ("Investments") of her 1999 SEI form. Defendant Stallings agrees that the above-listed items were received but does not necessarily agree that the receipt of each item constituted a disclosable event under state law or that if disclosable, she knowingly failed to disclose each item. The Government contends that all of the above-listed items should have been disclosed on Schedule E ("Income-Gifts") of defendant Stallings' 1996-99 SEI forms.

*California Disqualification Provisions and Stallings' Failure to Disqualify Herself*

10. Sections 87103 of the California Government Code presumes a public official to be financially interested in any governmental decision materially impacting a donor who gave above a certain amount to the official. The donor threshold set in the Act was two hundred fifty dollars ($250) or more in 1996, two hundred ninety dollars ($290) or more in 1997 and 1998, and three hundred dollars ($300) or more in 1999. Where the official received a gift or cumulative gifts above the threshold during the twelve months prior to a particular government decision, to avoid the possibility of biased decisionmaking, section 87100 of the California Government Code precludes the official from participating in or influencing governmental decisions affecting the donor.

11. Defendant Stallings participated in making multiple governmental decisions materially affecting Moores and the Padres, including:

a. on or about February 23, 1998, voting (with a unanimous City Council) in favor of a recommendation that the City of San Diego participate in financing for a new ballpark;

b. on or about March 24, 1998, voting (with a unanimous City Council) in favor of a recommendation to place a ballpark proposition before the people of San Diego in November 1998;

c. on or about June 16, 1998, voting (with a 4-3 majority) against a motion to increase the Padres' ballpark financing contribution to $150 million;

d. on or about March 31, 1999, voting (with a unanimous City Council) in favor of finding that the Padres and others had provided sufficient assurances of meeting their obligations for the ballpark project to continue;

e. on or about October 26, 1999, voting (with an 8-1 majority) in favor of approving an environmental impact report regarding the ballpark and related development; and

f. on or about December 14, 1999, voting (with a 6-3 majority, 6 votes being required to pass the measure under section 99 of the City Charter) to pass an ordinance authorizing (among other things) the sale of approximately $299 million in municipal bonds, and against a motion to delay the measure until questions raised by other Council Members could be answered, and revenue gaps addressed.

B. Factual Basis for Guilty Plea

1. Factual Basis for Count 1

In or about March 1998, Defendant Stallings, an elected city council person under the meaning of Title 9, California Government Code, Section 87200, having received gifts from Moores and the Padres in calendar year 1997 in excess of the disclosure threshold set forth in Title 9, California Government Code, Section 87207, knowingly failed to disclose those gifts as required under Title 9, California Government Code, Sections 87203 and 87207, in violation of Title 9, California Government Code, Section 91000.

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2. Factual Basis for Count 2

Defendant Stallings, knowing that she had received gifts from Moores in excess of the disqualification threshold set forth in Title 9, California Government Code, Sections 87100 and 87103 (and associated regulations), during the twelve months prior to the City Council votes set forth in paragraph 11(e)-(f) above, and that she was thereby disqualified from voting on those matters, nonetheless voted on those matters, in violation of Title 9, California Government Code, Section 91000.

1/29/01
Dated

GREGORY A. VEGA
United States Attorney
Southern District of California

1/29/01
Dated

PAUL J. PFINGST
District Attorney
County of San Diego

1/29/01
Dated

THOMAS E. HOLLIDAY
Defense Counsel

1/29/01
Dated

NICOLA T. HANNA
Defense Counsel

1/29/01
Dated

FRANK J. RAGEN, II
Defense Counsel

I declare under penalty of perjury under the laws of the State of California that I have read and understood this Addendum and that everything in it is true and correct.

1/26/01
Dated

VALERIE STALLINGS
Defendant

October 15, 1990

REPORT TO THE HONORABLE CHAIRPERSON AND
MEMBERS OF THE HOUSING AUTHORITY
HOUSING COMMISSION - PROPOSED ACQUISITION OF MT. AGUILAR AND PENASQUITOS GARDENS PROPERTIES - ALVIN I. MALNIK
HOUSING AUTHORITY AGENDA, OCTOBER 15, 1990 - ITEM NO. 2

At the Housing Authority special meeting on October 1, 1990, the Mayor posed several questions regarding the proposed acquisition of the Mt. Aguilar and Penasquitos Gardens properties. After considerable discussion, the Council continued the item so that the questions could be answered by this office and so that additional investigations could occur regarding the past activities of Mr. Alvin I. Malnik. The District Attorney's office and the City Police Department are cooperating in connection with such investigation.

At the October 1 meeting, reference was made by Councilmember Bernhardt to the task force which had on that date been created by the Housing Commission for the purpose of pursuing answers to questions similar to those raised by the Mayor. The Mayor indicated that she also proposed the formation of a task force. To our knowledge, neither task force has met as of Friday, October 12. We would be pleased to work with either or both task forces to answer legal questions arising from the proposed purchase of the properties, including any issues which may relate to the specific questions posed by the Mayor.

The specific questions raised by the Mayor at the October 1 meeting are:

1. Is the Alvin I. Malnik who owns the subject properties as "California Properties, a partnership," the same Alvin I. Malnik who has been the subject of various allegations regarding connections to major criminal elements?

A discussion with Evan Becker, together with a review of the background documents obtained by the Housing Commission in reviewing the financial background of Mr. Malnik, indicate that the Alvin I. Malnik referred to in news articles presented by Councilmember Henderson is the same person who owns the properties. We understand this fact has also been confirmed by the District Attorney's office.

2. What are the legal aspects of the "liquidated damages" clause in the Agreement to Purchase and Sell?

A copy of sections 1.8, 1.9, 1.10 and 1.21 are attached as Attachment 1. The provisions of sections 1.8, 1.9 and 1.10 relate to the deposits referred to in the liquidated damages clause. We are informed by the Housing Commission that while the Agreement to Purchase and Sell requires a first deposit of $25,000 "upon the opening of escrow," together with an additional deposit of $25,000 "upon removal of all ╒buyer inspectionσ contingencies" in part 2 of the agreement, escrow has not in fact been officially opened so that no deposits have actually been made as of this date. Such deposits would cumulatively constitute the liquidated damages amount called for in section 1.21.

As a legal matter, if the Housing Commission were to default under the terms of the Agreement to Purchase and Sell, the seller would be entitled to retain any deposits made by the Commission under sections 1.8 and 1.9.

It should be noted that section 1.10 provides for additional potential payments in the event the escrow does not close within 240 days of the effective date of the agreement, i.e., June 14, 1990. Therefore, if the Commission wished to extend the escrow beyond early March 1991, the agreement allows such extensions for two additional 30-day periods subject to additional deposits of $25,000 for the first extension and $50,000 for the second extension.

It must also be mentioned, of course, that the agreement provides in part 3 for certain "buyer's financing contingencies" which include requirements that the Housing Authority issue mortgage revenue bonds and that other financing events take place. The Housing Authority has discretion as to whether or not to sell such bonds.

3. The Mayor also mentioned section 1.4 of the agreement and asked whether the Housing Authority constitutes the "policy board" for the purpose of that section.

A discussion of the intent of the phrase "policy board" with the Housing Commission staff indicates that it was the intent of the Housing Commission that the Housing Commission be the "policy board." The Housing Commission did in fact, pursuant to the authority granted to it in Municipal Code section 98.0301, authorize the execution of the agreement for the purchase of the property.

4. The Mayor expressed concern with regard to the effect of section 5.2 "Successors and Assigns." A copy of the section is attached as Attachment 2. The section seems to be more or less "boiler plate" with the exception of the last clause which

specifically allows for the transfer of the Housing Commission's rights.

In summary, the Alvin I. Malnik who has been referred to in various news articles presented by Councilmember Henderson at the October 1 meeting is the same Alvin I. Malnik who owns the Mt. Aguilar and Penasquitos Gardens properties. The Housing Commission has not as yet deposited any of the "liquidated damages" amounts provided for in the Agreement to Purchase and Sell since escrow has not yet been opened. An initial deposit of $25,000 will be required when escrow opens, which amount would be forfeited if the Housing Commission subsequently defaults under the agreement. The agreement contains contingencies including a requirement that the Housing Authority issue mortgage revenue bonds. The Housing Authority retains considerable discretion in reviewing the facts and determining whether or not to sell such bonds. Failure to approve the sale of such bonds would ultimately result in termination of the Agreement to Purchase and Sell but would not subject the Housing Authority or the Housing Commission to the forfeiture of any deposits made into escrow.

By the above conclusions, we do not mean to express or imply any position by this office as to whether or not the Housing Commission should or should not proceed with acquisition of the Malnik properties. While, as attorneys, we are cognizant of injustices which have resulted from applications of the concept of "guilt by association" and by failures to "presume a person innocent until proven guilty," which concepts were discussed briefly at the October 1 meeting, we do not see any impropriety whatsoever in the City's reviewing the general reputation of persons with whom the City deals. Such review is obviously important when long term relationships are proposed, such as when the City leases its property or when the City enters into a disposition and development agreements concerning City property.

Such a review of general reputation may not be as important when the City proposes to purchase property. Obviously, any potential detriments to the citizens of this City which may result from the City's purchasing property from Mr. Malnik should be balanced against any benefits the citizens of this City may receive in the event the City determines to purchase the Malnik properties in the furtherance of the City's low-income housing program.

Respectfully submitted,
JOHN W. WITT
City Attorney

HOV:ps:559(043.1)
Attachments 2

RC-90-52

The San Diego Tribune
September 29, 1990

Headline: Don't spoil good housing deal

Opinion B-3

AS THE CITY battles to keep up with the increasing need for affordable housing, good public policy can't be allowed to fall victim to hysteria. But that's exactly the prospect the City Council faces Monday when it convenes to judge the future of hundreds of low-income renters.

Under scrutiny will be **Alvin Malnik**, a Miami lawyer who owns two San Diego apartment complexes that have provided low-rent housing for 15 years. On Thursday, Councilman Bruce Henderson charged that Malnik is a well-known mobster. And now the Housing Commission's plan to buy the 816 units so the rents won't be doubled or tripled, a deal once lauded as prudent, is in jeopardy.

As Henderson noted, Malnik has been accused of laundering mob cash in real estate deals and rubbing shoulders with various organized-crime figures, including the late Meyer Lansky. Though never convicted of a crime, he has been investigated by the **FBI, the Pennsylvania Crime Commission, the New Jersey Casino Control Commission and the Nevada Gaming Control Board.**

Indeed, Malnik's past isn't as pretty as his generally well-tended apartments. But how much should his past cloud the future of low-income residents? What should be of most concern to the civic conscience - striking a prudent deal if one player has a shady past or passing up a solid chance to keep a roof over the heads of hundreds of low-income families?

The city is facing a housing crisis. In the 1970s, federal incentives enticed developers across the nation to build low-rent housing. Low-interest loans were made available, and the developer was guaranteed a number of tenants whose rents would be subsidized by the government. In return, the developer agreed to a form of rent control, with increases based only on debt service charges and operating costs. The big fiscal carrot at the end of stick was a guarantee that after 20 years the units could be converted to market-rate rent levels. That 20-year period is drawing to a close and hundreds of thousands of low-income residents are about to face rent increases which could drive them into the streets.

The problem is acute in California, where real estate prices have skyrocketed in the past two decades. About 117,000 units are expected to emerge from beneath the low-cost umbrella, most in the next five years. Pushing their rents up to market rate almost

certainly means doubling or tripling them.

Some in Congress think the solution is to welsh on the original agreements with developers and approve legislation freezing rents below market rate, at least for a limited time. But such action is sure to inspire court challenges.

The wiser approach is the one taken by the city. The Housing Commission is trying to negotiate with property owners like Malnik to purchase the units and keep them affordable for low-income families. If the $38.5 million agreement is cancelled, thousands of people could lose their homes -- turning an old federal program into a new city headache.

The commission staff should have uncovered **Malnik's past** early on. But now that it's known, **it must be kept in perspective**. The city shouldn't enrich a mobster. But neither should it dismiss out of hand a chance to ensure affordable housing for hundreds of San Diegans.

The San Diego Tribune
October 17, 1990

Headline: Hasty promises on low-cost housing

Opinion B-6

THE SAN DIEGO City Council has made promises on low-income housing it might not be able to keep. Several council members told fearful residents not to worry about losing subsidized apartments in Clairemont and Rancho Penasquitos. They wouldn't let that happen, they said.

But they might not be able to stop it, if the council reneges on a deal to buy the two complexes with 816 units from Miami attorney **Alvin Malnik** for $38.5 million. That deal is under scrutiny following allegations that Malnik is a well-known mobster. A city Housing Commission task force is investigating those allegations. Its findings are due in a month.

On Monday, the council passed a resolution to continue negotiating with Malnik, but to wait for the task force findings before closing the deal. At the same meeting, residents of the two complexes pleaded with council members to buy the apartments so their rents will remain at a level they can afford. Mayor O'Connor and other council members repeatedly reassured the residents, promising that Congress wouldn't let the owners raise rents.

The two complexes were built under a federal program which granted subsidies to developers, who in return kept rents well below market level for 20 years. That 20-year period is ending for 600,000 apartments across the country. Congress is struggling with legislation to maintain the low rents, but the cost for continued federal subsidies on all those apartments would be billions of dollars. While federal housing officials insist that low-income residents will be protected, no legislation has been passed.

So it's premature for City Council members to promise that the federal government will protect low-income housing. Anyone banking on a definitive mandate from Washington need look no further than the present budget chaos.

The only way for the city to guarantee that low-income residents in Clairemont and Rancho Penasquitos keep their homes is for the city to buy those homes.

The Housing Commission staff is negotiating a prudent deal to buy the apartments and then keep rents low forever. If council members renege on that deal, they also may be backing out on their promises.

The San Diego Tribune
January 25, 1991

Headline: Housing deal is too good to refuse

Opinion B-8

AS THE GAP between rich and poor grows, our neighborhoods become increasingly segregated along economic lines. The result is a growing chasm of misunderstanding and disinterest between "we" and "they." If there is a problem in their neighborhood, what does that have to do with us?

In 1974, the San Diego City Council adopted a public housing policy to combat the social drift toward separate and unequal communities. It's called balanced community, and it dictates that the city Housing Commission should acquire public housing throughout the city with a goal of economic integration of our neighborhoods.

Perhaps the best examples of the balanced community policy are Penasquitos Gardens in Rancho Penasquitos and Mount Aguilar Apartments in Clairemont, two complexes with a total of 816 low-income units that the Housing Commission is negotiating to buy. The City Council will vote Tuesday whether to approve the purchase of these properties for $38.5 million. The purchase would be completely funded with federal and state money; no local funding is involved.

Both complexes blend in with the surrounding community. Most neighbors don't know that they live next to low-income housing. We think that's healthy. When the poor live in the same community with the better-off, they share the same concerns: schools, crime, parks, potholes. They have mutual obligations, their children play together, the distinction between "we" and "they" becomes blurred. The City Council wisely saw how balanced communities would benefit the city as a whole.

But now, the council is embroiled in a **minor tempest** about the purchase by the Housing Commission of Penasquitos Gardens and Mount Aguilar Apartments. Both properties are owned by Miami lawyer Alvin Malnik, a reputed mobster. Councilman Bruce Henderson and Mayor O'Connor are trying to scuttle the purchase, saying the city shouldn't deal with such people.

Both complexes were built with low-interest federal loans given to developers who agreed to offer low rents for 20 years. That 20 years is up, and unless the Housing Commission buys the properties, they likely will be sold to private owners who will soon raise rents to market level, double the present level. The 816 low-income units would be lost to the city's poor.

It's much more important to maintain 816 low-cost apartments in our city of ever-escalating rents than to refuse to deal with a reputed mobster and lose those apartments. Besides, ask

any real estate agent, $38.5 million for 816 apartments in Rancho Penasquitos and Clairemont is a steal. At such a price, the Housing Commission could just as easily be lauded for ridding the city of Malnik.

The San Diego Tribune
November 18, 1991

Headline: The mayor's sour victory Killing Malnik deal cost the poor housing

Opinion B-6

Mayor O'Connor is billing her successful effort to scuttle the city's purchase of two low-income apartment complexes from a reputed mobster as a **victory for ethics in government.** Don't believe it. The mayor merely exhausted Alvin Malnik's patience with innuendo when she couldn't defeat the deal on its merits. In the process, she likely cost the city 816 apartment units desperately needed by the poor.

Over the mayor's opposition, the council approved the project by a 6-2 vote -- and with good reason. Even if Malnik's past was questionable, the civic benefits in the deal weren't. The apartment complexes have provided low-income housing for 15 years under a federal program that will soon expire. When the program ends, the property's value could revert back to market rate.

That means rents would double or triple and roughly 3,000 people now in the complexes would have to scramble for affordable housing elsewhere.

The Housing Commission wanted to preserve that important housing stock. And Malnik was willing to sell the properties – Penasquitos Gardens and Mt. Aguilar Apartments – for $38.5 million, which was a steal.

But losing the vote only hardened O'Connor's opposition. Last month, she called a press conference to announce that an anonymous person had tipped her off to the presence of "major asbestos" in the two apartment complexes.

In truth, the complexes aren't believed to have any more asbestos than other apartment units constructed during that same era.

The Housing Commission was aware of the problem and negotiating a solution with Malnik.

Last week, the Miami attorney threw in the towel. He was fed up with the runaround -- including the six times in 16 months that he agreed to delay closing escrow at no cost to the commission. Now, the complexes may ultimately be sold to a private landlord more interested in profits than the poor or asbestos cleanup. **That's not a victory worth celebrating.**

MEMORANDUM OF LAW

DATE: June 5, 1989

TO: Mayor Maureen O'Connor and Councilmembers Wolfsheimer and Henderson

FROM: City Attorney

SUBJECT: Potential Conflict of Interest Arising from Council Discussion Regarding Proposed SDDPC Telecommunications Contract

Questions have arisen about potential financial conflicts of interest of the Mayor and two Councilmembers regarding a proposed telecommunications contract between the San Diego Data Processing Corporation (SDDPC) and a third party. The matter was discussed at the Council meetings of May 16 and 30, 1989. Subsequent to their vote on May 30, 1989 an article appeared in the LA Times on May 31 (copy attached). The Mayor and both Councilmembers have now requested a City Attorney review and response on whether they should abstain from voting.

BACKGROUND FACTS

I. Telecommunications Contract.

By amendment in 1986 of the operating agreement between the City of San Diego (City) and San Diego Data Processing Corporation (SDDPC), the City transferred to SDDPC the entire responsibility for obtaining telecommunication services for the City. SDDPC was formed as a separate non-profit corporation under California law to provide data processing (and now telecommunication) services to the City. SDDPC has its own Board of Directors that controls all affairs of the Corporation. The City is the sole member of the Corporation and its Board is appointed by The City Council. It has the capacity to enter contracts without Council approval.

Since the 1986 Amendment to the Operating Agreement, SDDPC has initiated an RFP and bidding process for telecommunication services (telephone vendor) to the City and Convention Center.

According to information supplied by telephone on May 31 by Bruce Gorton of SDDPC, seven (7) companies submitted bids on the telephone vendor RFP: 1. ATT; 2. Bell South; 3. GE/RCA; 4.GTE/GTEL; 5. NEC; 6. Pacific Bell; and, 7. Siemens/Tel Plus. Three (3) of the seven bidders bid NEC equipment (Bell South, Siemens/Tel Plus, and of course NEC). Prior to May 16, 1989, SDDPC had selected Siemens/Tel Plus with whom to negotiate the telephone vendor contract for both the City and Convention

Center. The names of all bidders and rankings were provided to the Mayor and Council by Memorandum May 10, 1989, by SDDPC Executive Vice President Robert Metzger.

II. Economic Interests.

The respective Statements of Economic Interests (hereinafter S.E.I.) show the following:

1. On her S.E.I. filed April 3, 1989, covering calendar year 1988, Mayor O'Connor lists the following investments and sources of income.
   a. Over $100,000 of General Electric Corporation bonds, owned by the Robert O. Peterson trust, disposed of October 21, 1988.
   b. $10,000-100,000 of NEC Corporation stock owned by Robert O. Peterson trust, acquired on July 25, 1988 and disposed of October 13, 1988.
   c. Over $100,000 of General Electric Capital bonds, owned by Robert O. Peterson trust, acquired on October 21, 1988.
   d. Over $10,000 income from interest and sale of General Electric Corporation bonds.
   e. Over $10,000 income from dividends and sale of stock of NEC Corporation.
2. On his S.E.I. filed April 3, 1989, covering calendar year 1988, Councilmember Henderson lists the following investments and sources of income:
   a. $10,000-100,000 of GTE Corporation stock (less than 10% interest).
   b. $250-1,000 income from dividends from GTE Corp. stock.
3. On her S.E.I. filed March 31, 1989, covering calendar year 1988, Councilmember Wolfsheimer lists the following investment interest:
   a. $26,700 of GTE Corporation stock.

According to the newspaper article, General Electric Corporation is a parent company of one of the bidders, GE/RCA. However, the City's Investment Officer, Raymond Day, clarified that General Electric Company merged with RCA recently. General Electric/RCA owns General Electric Finance Company, which in turn owns General Electric Capital Corporation. Thus, General Electric Capital is a subsidiary of one bidder, GE/RCA. Contrary to the assertion in the newspaper article, NEC is not a parent company of another bidder; it is a bidder in its own right.

The Clerk's records show that neither the Mayor nor

Councilmember Henderson were present at the Council meeting on May 16; Councilmember Wolfsheimer was. All three (3) were present, participated and voted at the meeting on May 30.

QUESTION PRESENTED:

Do the Mayor or the two Councilmembers mentioned above have a financial conflict of interest which disqualifies them from participation in any decision regarding the proposed SDDPC contract for telecommunication services to the City?

ANALYSIS

The fundamental rule regarding disqualifying Conflicts of Interest in the Political Reform Act of 1974 (the "Act") is found in Government Code section 87100 which reads as follows:

> 87100. Public Officials: State and Local.
>
> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

I. Do the Mayor and Councilmembers have a "financial interest" within the meaning of the Act?

To reach a conclusion under Government Code section 87100, the first issue to be determined is whether a public official has a "financial interest" within the meaning of the Act.

The term "financial interest" for purposes of section 87100 is defined in relevant part in Government Code section 87103, as follows:

> 87103. Financial Interest.
>
> An official has a financial interest in a decision within the meaning of section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his or her immediate family or on:
>
> a. Any business entity in which the public official has a direct or indirect investment worth one thousand dollars ($1,000) or more.
>
> . . .
>
> c. Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public

without regard to official status, aggregating two hundred fifty dollars ($250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

. . .

For purposes of this section, indirect investment or interest means any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official's agent, spouse, and dependent children own directly, indirectly, or beneficially a 10 percent interest or greater.

A. Meaning of "Investment".

The term "investment" under the Act includes common stock and debt instruments (bonds) owned directly or indirectly by the public official. Note that under section 87103, indirect investments include interests owned by a spouse or by a trust in which the official owns a 10% or greater interest.

B. Meaning of "Income".

The term "income" under the Act includes payments from dividends, interest, proceeds of any sale (including sales of stocks and bonds) and includes community property interest in the income of a spouse. It also includes a pro rata share of income of a trust in which the official or official's spouse owns directly, indirectly or beneficially a 10 percent interest or greater. Income specifically does not include "dividends, interest, or any other return on a security registered with the Securities and Exchange Commission of the United States government," except it includes "proceeds from the sale of securities". Government Code section 82030(b)(5).

C. Do Mayor or Councilmembers have "Income" Interests?

Assuming GTE Corporation's stock is registered with the SEC, neither Councilmember Henderson nor Wolfsheimer has a prohibited income interest in GTE Corporation under the definition of income by virtue of any dividends they received. Government Code section 82030(b)(5).

Different issues arise with respect to the Mayor's interests. First, she has declared having received income from dividends and sales of NEC stock and General Electric bonds held by the Robert O. Peterson Trust. Therefore, we must assume that she has a 10% or greater interest in the trust. (See definition of "income"

quoted above.) Also, her pro rata share of dividends or bond interest received by the trust must be claimed as income to her under the general rule. However, if the securities are listed with the SEC, dividend or interest income does not have to be counted as "income". Government Code section 82030(b)(5). The City's Investment Officer, Raymond Day, informed me that GE/RCA's securities are listed with the SEC, but NEC's are not. Therefore, NEC dividends, if any, would count as income to the Mayor, but General Electric Corporation bond interest would not.

The Mayor's S.E.I. is not clear as to how much she received in income from dividends and interest from NEC and GE respectively, as opposed to how much she (or the trust) received from the sale of NEC stock and General Electric Corporation bonds. In any event, if the trust or she received any gain from

the proceeds of the sales, that gain would count as income to her. For purposes of counting income from sales of securities, it is irrelevant whether they are registered with the SEC. Government Code section 82030(b)(5).

D. Do Mayor or Councilmembers have "Investment" Interests?

Assuming they continue to hold the GTE stock, it is clear that both Councilmembers Henderson and Wolfsheimer have "investment" interests in GTE Corp within the meaning of the Act, because they each hold over $1,000 worth of stock in that company.

It is not clear from the facts whether they have a financial interest in that company which would preclude them from discussing the telecommunications contract. To make that determination requires further analysis of the terms of the Act, discussed below.

In contrast with analysis of potential "income" interests, which requires looking back 12 months prior to the date of governmental decisionmaking (Government Code section 87103(c)), an "investment" interest stops on the date the common stock, bond or other investment interest is sold or otherwise disposed of. Therefore, Mayor O'Connor did not have an investment interest in NEC Corp after October 21 1988, the date the Peterson trust sold the NEC stock. However, even though the Peterson trust disposed of the General Electric bonds in October 1988, she does have a continuing investment interest in General Electric/RCA arising from the Peterson Trust's acquisition of General Electric Capital bonds on October 21, 1988, because General Electric Capital is a subsidiary of GE/RCA. Again, just because the Mayor has a continuing investment interest in GE/RCA does not mean that she

is disqualified from participating in discussions regarding the telecommunications contract. That determination can be made only after the following analysis.

II. Do Mayor or Councilmembers Have a Disqualifying Financial Interest?

Even if a public official has a "financial interest" that is somehow related to a governmental decision, that financial interest is not necessarily a disqualifying interest unless the terms of Government Code section 87100 and 87103 are met. In addition to finding a financial interest, Government Code section 87100 requires a determination that: 1. the public official made, or participated in making, a governmental decision or attempted to influence a governmental decision; and, 2. the public official knew or had reason to know that the governmental decision would have an impact on his or her financial interests. Third, Government Code section 87103 requires determining whether it was reasonably foreseeable that the governmental decision would have a "material financial effect" on those financial interests. Each of these requirements is discussed below.

A. Was There A Governmental Decision?

The first question to be determined is whether the actions of the Mayor and Council on May 16 and 30 were in the nature of making, or participating in making, a governmental decision, or attempting to influence one.

At the outset, it should be recalled that neither the Mayor nor Councilmember Henderson was present at the May 16 hearing. Councilmember Wolfsheimer, however, was present. All three (3) were present, participated and voted on May 30 according to the Clerk's records. The terms "public official making or participating in making a governmental decision" and "using official position to influence" are defined in FPPC regulations 18700 and 18700.1 (copies attached). The actions of May 16 and 30 do not appear to rise to the level of participation in a governmental decision within the meaning of Regulation 18700, because a City contract was not involved. However, there may have been an attempt to influence another governmental agency's (SDDPC's) action.

Under Regulation 18700.1, influencing a governmental decision includes "a governmental decision which is within or before an official's agency or an agency appointed by or subject to the budgetary control of his or her agency, in which the official is attempting to use his or her official position to influence the decision if, for the purpose of influencing the decision, the official contacts, or appears before, or otherwise attempts to

influence, any member, officer, employee or consultant of the agency." ┌Emphasis addedσ.

SDDPC is a corporation wholly owned by the City of San Diego, and subject to the City's budgetary control. The ultimate governmental decision at issue is the award of the telephone vendor contract by SDDPC. Even though under the terms of the operating agreement between the City and SDDPC, SDDPC alone was to select the telephone vendor for the City and Convention Center, documents on file with the City Clerk reveal that the Council's discussion and actions on May 16 and May 30 were an attempt to have SDDPC reexamine its bidding process used to select the successful bidder and ultimately to reopen the process to reconsider the other six (6) unsuccessful bidders. On May 30, the Council adopted two (2) resolutions (No. R-273618 and R-273620): one to recommend bifurcating the telephone vendor contract to allow the Convention Center to go forward; the second to in effect ask SDDPC to reconsider its bid process to allow all seven (7) bidders to submit a "final best offer." The Council agenda also contained a third resolution, one which would have terminated the entire agreement between SDDPC and City. This third resolution was not adopted. The Mayor and Councilmembers Henderson and Wolfsheimer voted to adopt the two resolutions. Clearly, the action of the Council on May 30 was in the nature of influencing the bid process and ultimately the award of a governmental contract.

It is doubtful whether Councilmember Wolfsheimer's actions on May 16 rise to the level of attempting to influence a governmental decision. (Remember, Mayor and Councilmember Henderson were not present on May 16.) All that Councilmember Wolfsheimer did on May 16 was second an action by Councilmember Roberts and vote to direct the City Attorney to draft three (3) resolutions for discussion and consideration at a later date. We conclude that absent more facts showing the level of her participation on May 16, Councilmember Wolfsheimer was not attempting to "influence a governmental decision" within the meaning of Government Code section 87100 by her actions on May 16.

B. Did the Mayor or Councilmembers know or should they have known of a material financial effect on their respective financial interests?

A government official does not have a disqualifying financial interest in a governmental decision unless he or she knows or has reason to know that he or she has a prohibited financial interest.

As of the date the Mayor and Councilmembers' offices received Robert Metzger's May 10 memorandum, the Mayor and Councilmembers either knew or should have known the names of the seven (7) bidders on the telecommunications contract. Even though some of the names in the S.E.I.'s are not identical to the bidders' list, the names are similar enough to invite inquiry as to the relationship of the companies.

Therefore, we conclude that as of the date of receipt of the Metzger memo, the Mayor and Councilmembers knew or should have known the names of the bidders and should have been alerted to review their financial portfolios and S.E.I.'s for possible financial interests.

C. Was there a material financial effect on the financial interests?

Having determined that the Mayor and Councilmembers Henderson and Wolfsheimer knew or had reason to know that their

participation in the discussion and vote at the May 30 meeting would possibly impermissibly affect one of their financial interests, it is next necessary to determine whether it was reasonably foreseeable from their participation in the discussion and decision that that there would be a material financial effect on their interests.

The FPPC has recently issued some revised regulations effective November 16, 1988, interpreting the meaning of "material financial effect". See 2 California Code of Regulations 18702-18702.6. While the rules are too lengthy to quote here, they are summarized below.

1. Was there a material financial effect on investments?

If the public official's investment interest is directly involved in the governmental decision, then Regulation 18702.1(a) applies to determine materiality. Regulation 18702 and 18702.1(a). The materiality of effect on investments in business entities not directly involved in a decision is determined by Regulation 18702.2.

A person or business entity is not directly involved in a decision before an agency unless that person or entity either: 1. initiates the proceedings before the agency; or, 2. is a named party or is a subject of the proceedings. Being the "subject of the proceeding" involves the issuance, approval, renewal, denial, or revocation of a license, permit or contract. Regulation 18702.1(b)

Since the discussion and decision taken by the Council on May 30 did not "directly involve" either GE/RCA, GTE/GTEL, or NEC, the applicable regulation is 18702.2. In order to apply

Regulation 18702.2 with certainty, it is necessary to know certain facts about the financial status (gross revenues, assets, whether its securities are traded on the NYSE, etc.) of the business entity in whom the public official has an investment. In the present case, however, the award of a $12-18 million contract would necessarily have a significant impact on the gross revenues, assets or income of virtually any size business entity, ranging from the smallest to those listed with the SEC and traded on the NYSE or ASE. There is no serious question that the award or failure to receive the award of the telecommunication contract will have a material financial effect on the investments held by the Mayor and Councilmembers Henderson and Wolfsheimer. Therefore, we conclude that the vote of May 30 would have a material financial effect on GE/RCA and GTE/GTEL, since they were unsuccessful bidders in the original proposal by SDDPC to award the contract to Siemens/Tel Plus.

2. Was there a material financial effect on Mayor's income interest?

We have determined that neither Councilmember Henderson nor Wolfsheimer had income interests within the meaning of the Act. But, as shown above, the Mayor may have income interests arising from the Peterson Trust's ownership and sale of NEC stock and sale of General Electric Corporation bonds in 1988. Hence it is necessary to examine whether her May 30 participation had a material financial effect on those income interests.

Again, from the above analysis of Regulation 18702.1(b), the Council's action of May 30 did not have a direct effect on the Mayor's income interests. However, when determining the impact on income interests, as opposed to investment interests, that regulation also requires examining whether there is a "nexus" between the purpose for which the official receives income and the governmental decision. Regulation 18702.1(a) and (d). There is such nexus only if the official "receives income to achieve a goal or purpose which would be achieved, defeated, aided or hindered by the decision."

In the present case, there appears to be absolutely no nexus between the Council's vote on May 30 and the reason for which the Mayor received income in the past 12 months from NEC or General Electric Corporation. On the contrary, the sale of NEC stock and General Electric Capital bonds was complete in October 1988. There could be no possible impact on NEC or General Electric Corporation as sources of income (as opposed to investments) by virtue of her vote on May 30.

Since we have determined that there would be no material

financial effect on NEC or General Electric Capital as sources of income, assuming there was "direct involvement", there is no need to examine whether there would be a material financial effect on them as business entities under the "indirect involvement" rule, Regulation 18702.2.

CONCLUSION AND ENFORCEMENT RECOMMENDATION

I. Conclusion.

The Mayor has an investment interest in GE/RCA, one of the disappointed bidders for the SDDPC telecommunications contract, because of her interest in the Robert O. Peterson trust, which owns bonds of General Electric Capital Corporation, a subsidiary of GE/RCA. Councilmembers Henderson and Wolfsheimer have an investment interest in GTE/GTEL, one of the other disappointed bidders on the telecommunications contract. The Mayor may also have an income interest in NEC Corporation, because of the Peterson trust's prior ownership and sale of stock in that company, and a residual income interest in General Electric Corporation, because of the Peterson trust's prior ownership and sale of bonds in that company.

The actions of Councilmember Wolfsheimer on May 16 do not rise to the level of participating in influencing a governmental decision. However, the actions of the Mayor and both Councilmembers on May 30 were attempts to influence a governmental decision within the meaning of the Act, by exerting its influence on SDDPC to reopen the bid process to all seven (7) bidders on the telecommunications contract.

As of the date of receipt of the Robert Metzger memorandum, the Mayor and Councilmembers Henderson and Wolfsheimer knew or had reason to know who were the seven (7) bidders on the contract and the relationship of these companies to their financial holdings. Further the Mayor and Councilmembers Henderson and Wolfsheimer's actions on May 30 had a reasonably foreseeable material financial effect on their investment interests, although that is not true for the Mayor's income interests.

II. Enforcement Action Recommendation.

As a result of the above analysis, we have concluded that the participation by the Mayor and Councilmembers Henderson and Wolfsheimer in the May 30, 1989 vote resulted in a violation of the disqualification requirements of California Government Code section 87100. While violations of the Political Reform Act carry both misdemeanor and civil penalties under Government Code section 91000(b) and 91005(b), there is no evidence at this time to show that the Mayor or Councilmembers Henderson or Wolfsheimer intentionally or wilfully violated the statute. The presence of

good faith should be taken into account in applying the Act's enforcement provisions, as section 91001(c) counsels:

> (c) Whether or not a violation is inadvertent, negligent or deliberate, and the presence or absence of good faith shall be considered in applying the remedies and sanctions of this title.

In reviewing the evidence available to date, including both the purpose of the May 30 vote and the complicated and, at times, conflicting nature of the economic interests involved, we find

the Mayor and Councilmembers' failure to disqualify themselves resulted from both inadvertence and good faith. First, as chronicled in pages 5 through 10 of this memorandum, income and investment rules differ in application and effect and require amplification before a decision to disqualify can be made. Second, while the vote influenced a governmental decision, the effect of the vote on the financial interests (the companies in which the public officials have an interest) was speculative. After all, any reconsideration of the telecommunications bid by SDDPC could yield the same result. Hence, Councilmembers, while technically "influencing a governmental decision" within the meaning of the Act, could have plausibly assumed the vote was one of procedure and not of substance with no direct impact on the award of a contract.

Now that the nature and effect of these financial interests have been ascertained, however, the Mayor and Councilmembers Henderson and Wolfsheimer should disqualify themselves from participating in any future procedure that involves the consideration or reconsideration of the telecommunications bidding process or award.

JOHN W.WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

TB:CCM:jrl:048(x043.2)
Attachments (2)
ML-89-56

MEMORANDUM OF LAW

DATE: June 19, 1989

TO: Councilmember Bruce Henderson
FROM: City Attorney
SUBJECT: Meaning of "Material Financial Effect/Conflicts of Interest

This is in response to your memorandum of June 6, 1989, containing follow-up questions regarding our Memorandum of Law dated June 5, regarding potential conflicts of interest in San Diego Data Processing Corporation's (SDDPC) telecommunication contract. First, you ask for a clearer copy of the recently revised Fair Political Practices Commission regulations defining the term "material financial effect." A copy is attached.

Second, you question whether the Council's action of May 30 was sufficient to create a conflict of interest for you by virtue of your ownership of GTE's stock. You characterize the Council's action as: "SDDPC was requested to seek additional expert advice in reviewing their bid evaluation procedures prior to actually awarding the telephone contract bid". You point out in your memo that "no award was made by the Council, nor was any bidder rejected by Council." Specifically, you query: "Is it sufficient to create a conflict that the Council's action simply made it possible for GTE to continue, along with every other bidder, to participate in the bidding process?"

The essential issue underlying your question is whether the City Council attempted to "influence" a governmental decision made by another governmental agency, SDDPC. We agree that the Council did not by its May 30 action directly affect a City contract, and hence did not "participate in a governmental decision" within the meaning of the law. However, as shown in FPPC Regulations 18700 and 18700.1 attached to the June 5 memo, the regulation defining "influencing a governmental decisions" is very broad. The definition clearly includes attempts by City Councilmembers to influence the award of a contract by one of its wholly owned corporations, such as SDDPC. Even though the Council did not and could not legally direct SDDPC to award the

contract to one bidder over another, there was clear dissatisfaction on the part of the Council with the manner in which SDDPC had selected the final bidder, Siemens/Tel Plus. The upshot of the Council action and discussion was to encourage SDDPC to reconsider its procedure and allow all seven (7) bidders

to submit further bids ("final best offers"). In other words, the Council action was a measure to encourage SDDPC to allow six (6) disappointed bidders, GTE included, another bite of the apple.

The second issue underlying your question relates to the relative level of certainty required to find that there will be a financial impact on an official's economic interest resulting from a particular governmental decision. The test to determine whether there is a conflict under Government Code section 87100 and 87103 is whether it is reasonably foreseeable that a governmental decision will have a material financial effect on one of the official's economic interest. The term "reasonably foreseeable" is not defined in the statute or in FPPC regulations, but it was discussed at length by the FPPC in one of its early advisory opinions, In the Matter of Tom Thorner, 1 FPPC Opinions at 198 (1975). After reviewing both federal and California cases that discuss the meaning of "reasonable foreseeability" in the conflict of interest area, the FPPC stated: "the question of whether financial consequences upon a business entity are reasonably foreseeable at the time a governmental decision is made must always depend on the facts of each particular case." 1 FPPC Opinions at 205. Although "the statute requires foreseeability, not certainty, . . . the ultimate test is whether the element of foreseeability, together with the other elements
. . ., is present to the point that the official's 'unqualified devotion to his public duty' might be impaired." ┌citation omittedσ. 1 FPPC Opinions at 206.

In your memorandum, you emphasize that the statute uses the term "will have", not "might have", or "could have". The statute reads in relevant part: "An official has a financial interest in a decision . . . if it is reasonably foreseeable that the decision will have a material financial effect . . ." on certain economic interests. Government Code section 87103. The cases and regulations focus their attention on the phrase "reasonable foreseeability", not the term "will have". As the Thorner opinion points out, the statute requires not certainty, but foreseeability. Whether there is in fact a conflict depends on the facts of a given case.

Since in the present case it was foreseeable at the time of the May 30 vote that the Council's actions would result in the SDDPC bidding process being reopened to allow all seven (7) bidders (including GTE as one of the original six (6) disappointed bidders) to rebid on an admittedly lucrative

contract ($12-18 million), we concluded on those facts that the action created a reasonably foreseeably material financial effect on one of your economic interests, GTE.

Last, you query whether the conflict provisions would apply if you had voted to deny the contract to GTE to its detriment. As the attached regulation 18702.2 on "materiality" points out, the effect of a decision is considered material on a business entity in which a public official has an economic interest if the decision results in an increase or decrease in revenues. Therefore, the answer to your question is "yes".

JOHN W. WITT, City Attorney
By
Cristie C. McGuire
Deputy City Attorney

CCM:jrl:048(x043.2)
Attachments
ML-89-65

JMI



August 30, 2004

Mr. Brad Schultz
Real Estate
San Diego United Port District
Post Office Box 120488
San Diego, California 92112-0488

Re: Padres L.P. and San Diego Ballpark Funding LLC—Lessee's and Sublessee's Questionnaire

Dear Brad:

Enclosed is the captioned questionnaire. Please call me if you have any questions at 858-350-1873.

Sincerely,

Bryant W. Burke

cc: Fred Gerson (w/encl.)
Charles E. Black (w/o encl.)

12680 High Bluff Drive | Suite 200 | San Diego, CA 92130 | Office (858) 259-2500 | Fax (858) 259-8496

This Questionnaire contains 15 pages. 8/16/01

## PROPOSED (SUB)LESSEE

1. Name of proposed (Sub)Lessee exactly as it will appear on the actual tenancy document:

   **The current Lessee is Padres L.P.**

2. Mailing Address of proposed (Sub)Lessee for purposes of notice or other communication relating to the proposed tenancy:

   **100 Park Boulevard**
   **San Diego, California 92108**
   **Attention: Chief Financial Officer**
   **Attention: General Counsel**

   Telephone No.: **619-795-5065** Fax. No.: **619-795-5067**
   E-mail Address: **Fgerson@padres.com**

3. Billing Address (***only if different from Mailing Address);***

   _____

   _____

   _____

   Telephone No.: _____ Fax. No.: _____

4. Proposed (Sub)Lessee intends to operate as a:

   Sole Proprietorship ( ); Partnership ( x ); Corporation ( );
   Limited Liability Company ( ); Other _____

   Explain if necessary:

5. Effective date of assignment (complete only if applicable):
   **The Lease has been assigned to San Diego Ballpark Funding, LLC, whose sole member is Padres L.P.**

## PARTNERSHIP STATEMENT

If proposed (Sub)Lessee is a partnership, please answer the following:

1. Date of Organization: **December 21, 1994**

2. General Partnership ( )
   Limited Partnership ( **X** )
   Other ( ) Explain _____

3. Statement of Partnership recorded: Yes ( ) No ( )
   _____
   Date Book Page County

4. Has the partnership conducted business in San Diego County?
   Yes ( X ) No ( ) If so, when?
   **Since 1994**
   If so, where?
   **Qualcomm Stadium**

5. Name, address, and partnership share of each general and limited partner. If a general partner is another partnership, a corporation, or a limited liability company (LLC), please complete separate pages 3; or 4 and 5; or 6, as appropriate for such entity (type proposed [Sub]Lessee name [from page 2] on the top of each page for identification purposes). If a limited partner holding a 10% or greater interest is another partnership, a corporation, or an LLC, pages 3; or 4 and 5; or 6 must also be completed for such entity (type proposed [Sub]Lessee name [from page 2] on the top of each page).

| General/Limited | Name | Address | Share % |
|---|---|---|---|
| General | **Padres, Inc.** | **100 Park Avenue<br>San Diego, California 92108** | **1.04%** |
| Limited | **John Jay Moores and Rebecca Ann Moores Family Trust** | **12680 High Bluff Drive, Suite 200<br>San Diego, California 92180** | **83.62%** |
| Limited | **Jennifer Moores Trust/Jennifer Moores Trust** | **12680 High Bluff Drive, Suite 200<br>San Diego, California 92180** | **5.96%** |
| Limited | **Glenn Doshay** | ***P.O. Box 675910<br>6279 Via Campo Verde<br>Rancho Santa Fe, CA 92067*** | **5.00%** |
| Limited | **Werner Baseball,** | ***c/o Capell Duitch Franklin & Co.*** | **4.38%** |

## CORPORATION STATEMENT

If proposed (Sub)Lessee is a corporation, please answer the following:

**This information is being provided for Padres, Inc., the general partner of Padres L.P.**

1. Type of corporation: C ( ) Subchapter S ( **X** )

2. When incorporated? **August 10, 1994**

3. Where incorporated? **Delaware**

4. Is the corporation authorized to do business in California? Yes ( **X** ) No ( )

   If so, as of what date? **December 19, 1994**

5. The corporation is held:
   a. Publicly ( ) Privately ( **X** )
   b. If publicly held, how and where is the stock traded?

   _____

6. Please list the following:

| | Authorized | Issued | Outstanding |
|---|---|---|---|
| a. Number of voting shares: | **1000** | **1000** | **1000** |
| b. Number of nonvoting shares: | | _____ | _____ |
| c. Number of shareholders: | | | _____ |
| d. Value per share of Common Stock: | | Par | $ _____ |
| | | Book | $ _____ |
| | | Market | $ _____ |

7. Please furnish the name, title, address, and the number of voting and nonvoting shares of stock owned by each officer and, in addition, the same information for each stockholder owning more than 10% of any class of stock.

   Name: **John Jay Moores and Rebecca Ann Moores Family Trust**

   Title: _____

   Address: _____

   _____

   No. of Shares: **1000**

## LIMITED LIABILITY COMPANY STATEMENT

If the proposed (Sub)Lessee is an LLC, please answer the following

**This information is provided only for the purpose of evidencing the ownership of San Diego Ballpark Funding LLC, to which the lease has been assigned:**

1. Date of Organization: **July 6, 2000**

2. Where Organized: **Delaware**

3. Is the Company authorized to do business in California?

   a. Yes ( **X** ) No ( )
   b. If so, as of what date? **July 21, 2000**

4. Has the Company conducted business in San Diego County?

   a. Yes ( **X** ) No ( )
   b. If so, when? **2002**
   c. If so, where? **Petco Park**

5. Please furnish the name, address, and membership share held by each manager and officer, and each member owning more than a 10% membership interest. If a member is a partnership, corporation, or another LLC, please complete separate pages 3; or 4 and 5; or 6, as appropriate for such entity (type proposed [Sub]Lessee name [from page 2] on the top of each page).

| Manager/Officer/ Member | Name | Address | Share % |
|---|---|---|---|
| **Member** | **Padres L.P.** | **100 Park Avenue San Diego, California 92108** | **100%** |
| | | | |
| | | | |
| | | | |
| | | | |

## FINANCIAL AND OTHER BACKGROUND INFORMATION

### FINANCIAL STATEMENT

(Sub)Lessee, general partners of (Sub)Lessee, owner-corporations of (Sub)Lessee, members of (Sub)Lessee owning more than a 10% membership interest, and any person or business entity guaranteeing the performance of (Sub)Lessee **must attach a complete report, prepared in accordance with good accounting practice, reflecting current financial condition.** The report **must** include a balance sheet **and** annual income statement. The person or entity covered by the report must be prepared to substantiate all information provided.

**The requisite financial statements may be reviewed at the offices of the Padres**

### OTHER INFORMATION

Each (Sub)Lessee, each general partner of (Sub)Lessee, each owner-corporation of (Sub)Lessee, each member of (Sub)Lessee owning more than a 10% membership interest, any person or business entity guaranteeing the performance of (Sub)Lessee, any person or entity owning more than a 10% interest of (Sub)Lessee, and any guarantor of (Sub)Lessee must answer the following questions:

1. **Surety Information** - Has a surety or bonding company ever been required to perform on the default of any of the individuals or entities?

   a. Yes ( ) No ( **X** )
   b. If yes, please attach a statement naming the surety or bonding company, date, amount of bond, and the circumstances surrounding said default and performance.

2. **Bankruptcy Information** - Have any of the individuals or entities ever been adjudicated bankrupt or are any presently a debtor in a pending bankruptcy action?

   a. Yes ( ) No ( **X** )
   b. If yes, please give dates, court jurisdiction, and amount of liabilities and assets.

3. **Pending Litigation** - Are any of the individuals or entities presently a party to ANY pending litigation?

   a. Yes ( **X** ) No ( )
   b. If yes, please provide detailed information for each action. **These are matters relating the litigation involving John Moores related to Peregrine Systems, Inc.**

4. **Claims, Liens, or Judgments** - Are any of the individuals or entities now subject to any outstanding claims, liens, or judgments?

   a. Yes ( ) No ( **X** )

## REFERENCES FOR PROPOSED (SUB)LESSEE

Please list four persons or firms with whom you have conducted business transactions during the past three years. Two of the references must have knowledge of your debt payment history, with at least one being a financial institution. Two of the references must have knowledge of your business experience.

### REFERENCE NO. 1

Name: **Lawrence S. McDonald**

Firm: **Wells Fargo Bank**

Title: **Vice President**

Address: **4475 Executive Drive, First Floor**
**San Diego, California 92121**

Telephone: **858-597-4470**

Nature and magnitude of purchase, sale, loan, business, association, etc.:

**Loans**

### REFERENCE NO. 2

Name: **Heather Davis**

Firm: **TIAA-CREF Association**

Title: **Director-Private Placement**

Address: **8500 Andrew Carnegie Blvd**
**Charlotte, North Carolina 28262**

Telephone: **704-988-4160**

Nature and magnitude of purchase, sale, loan, business, association, etc.:

**Ballpark Financing**

REFERENCE NO. 3

Name: ***Mary Ann Landri***

Firm: ***Citibank***

Title: **Customer Service Officer**

Address: **10838 Bernardo Plaza Court #201**
**San Diego, CA 92128**

Telephone: **(858) 487-4796**

Nature and magnitude of purchase, sale, loan, business, association, etc.:

**Commercial Banking**

---

REFERENCE NO. 4

Name: ***Craig Kaye***

Firm: **Bank of New York**

Title: **Assistant Treasurer**

Address: **10161 Centurion Parkway**
**Jacksonville, FL 32256**

Telephone: **(904) 998-4724**

Nature and magnitude of purchase, sale, loan, business, association, etc.:

**Ballpark Financing**

## METHOD OF OPERATION

Please describe your proposed business operation on the property to be (Sub)Leased. Discuss any optional services and uses which you propose to provide.

**Parking Lot**

## ESTIMATE OF GROSS RECEIPTS

If this Questionnaire is being completed by a prospective Lessee, please show the best estimate of the average annual gross sales for each significant use or service, and for each significant optional use or service which the Lessee and its Sublessees (if any) plan to conduct on or from the property. (If the Questionnaire is being completed by a Sublessee, only the estimate of the Sublessee's gross sales is required.) This data will be used by the District to analyze the proposed Lease or Sublease Consent application. The time periods shown should not be assumed to necessarily represent the term of a (Sub)Lease that may be granted or consented to by the District.

Average annual gross sales for each proposed significant use during each of the first five operating years:

| | Uses (Identify Each Use) | | | | |
|---|---|---|---|---|---|
| Year of Operation | **Parking** | | | | |
| 1 | **$850,000** | | | | |
| 2 | **$850,000** | | | | |
| 3 | **$850,000** | | | | |
| 4 | **$850,000** | | | | |
| 5 | **$850,000** | | | | |

## EXPERIENCE STATEMENT

Please describe in detail the duration and extent of your business experience, with special emphasis upon experience with the type of business which you propose to conduct on District property. Also state in detail the pertinent experience of the persons who will be directly involved in development and management of the business.

**The parking will be managed by Ace Parking Management, Inc., whose sole business is the operation of parking facilities.**

THE CITY OF SAN DIEGO

February 17, 2000

Matt Potter
San Diego Reader
P.O. Box 85803
San Diego, CA 92186

Dear Mr. Potter:

The City Manager received your Public Records Act request, dated February 4, 2000, on February 9, 2000. In the letter you requested "all information in the possession of the City of San Diego regarding the identity of all equity and lien interests in the San Diego Padres professional baseball team and Padres-related joint ventures, corporations, partnerships, and any other entities which are doing business with the city under term os the so-called Padres MOU, adopted by San Diego voters in November, 1998."

The Public Records Act entitles you to review documents in the possession of the City; it does not entitle you to "information." The only documents in the possession of the City that are responsive to your request are: 1) a copy of the first priority lien in the Padres' franchise, provided by the Padres in compliance with the MOU; 2) the UCC-1 form recording that lien; and 3) the Design-Build Procurement Consultant Agreement, approved by the City Council on February 1, 2000, which extended the coverage of the lien. Copies of these documents are enclosed.

You may find additional information through the California Secretary of State by requesting a UCC-1 search, or performing one yourself at the Secretary of State's internet site.

Sincerely,

Bruce A. Herring
Deputy City Manager

mcw

Enclosures

Office of the City Manager
202 C Street, MS 9A • San Diego, CA 92101-3869
Tel (619) 236-6363 Fax (619) 236-6067

San Diego Reader

September 14, 2000

SANDIEGOREADER.COM

# Such Good Friends

*By Matt Potter*

It was the beginning of 1998, and John Moores, owner of the Padres, was ramping up his bid for a new baseball-only stadium downtown, to be paid for by San Diego taxpayers. His plan called for placing a measure on the November ballot that, if approved by voters, would not only give him a new stadium but also turn over to him and his associates exclusive development rights for a huge chunk of an old warehouse neighborhood on downtown's east side. It was a decidedly rich and lopsided proposal, but Moores was sure he could get it passed.

By the end of 1999, even the San Diego Taxpayers Association, an influential business group that had backed the original ballot measure, was warning of a dire fate if the city council did not change course. "The city manager is now recommending that the City Council authorize a nancial experts who noted that there were no guarantees attached to the measure. Cash shortfalls would have to come out of the city's general fund.

"Does the city know how much revenue will be generated and when it will be available to pay off the estimated $20 million annual bond payments? Answer: No. But the city will have to pay all the debt service, no matter how much in new hotel-tax revenues is actually available.

"The council must now close the loopholes that put the taxpayers at risk. How long this will delay the project is not clear. What is clear is that if the City Council votes today to proceed with ballpark bond financing, it will be placing the city treasury at enormous risk."

Yet, despite the critics, the city council has proceeded with the Moores plan and has even advanced millions of dollars of cash from city reserves to make sure construction proceeds, while a federal grand jury looks into the Moores-related stock

In return, Padres boardmembers, such as financier Ted Roth and syndicated columnist George Will, have taken councilmembers out for meals. Staff members have received tickets to games and invitations to dine in Lucchino's stadium box. Lucchino gave $500 for cancer treatment of a council staffer. And Lucchino, Moores, his daughter Jennifer McLeod, and Padres executives including McGrory have been donors to political campaigns of the councilmembers; several of the contributions were made only days or weeks after the councilmember seeking the contribution met privately with McGrory and other Padres officials or cast crucial votes in favor of the team.

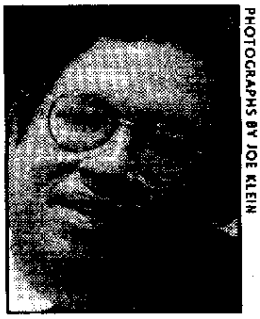
Below is an 18-month chronology of Padres–city council contacts and actions as gathered from public records act re-

*Valerie Stallings*

*John Moores*

*Larry Lucchino*

*Harry Mathis*



*Charles Steinberg*

PHOTOGRAPHS BY JOE KLEIN

*Juan Vargas*

*Herb Klein*

*George Will*

*Christine Kehoe*

*Ted Roth*

*Judy McCarty*

*Jack McGrory*

*George Stevens*

*Byron Wear*

*Julie Meier Wright*

His ace in the hole was the San Diego City Council. By the summer of 1998, the council had readily given in to virtually all of his demands. That November, the measure was easily approved by voters, assured by a unanimous city council that the proposal was financially sound. But almost as soon as it had been adopted, the project faced mounting questions. Huge overruns in construction and land costs suddenly surfaced. The optimistic estimates of revenue that the project and its surrounding real estate development would generate were challenged by fi-

sale of up to $299 million in bonds, clearly contrary to voter action," wrote Taxpayers Association executive director Scott Barnett in a December 14, 1999, op-ed piece published in the *San Diego Union-Tribune*.

"Does the city of San Diego know how much its total contribution to this project, including land acquisition, required infrastructure improvements, and bond expense, will actually cost taxpayers? Answer: No. Yet once the bonds are issued, the city will be required to pay for all of these redevelopment components, whatever the price.

dealings of councilwoman Valerie Stallings.

What has kept the city council so loyal to the Moores plan? Recently released records show that councilmembers and their staff have frequently phoned and met privately with Moores, his partner Larry Lucchino, and their employees, including ex–city manager Jack McGrory and Kris Michell, an ex-aide to Susan Golding. According to the records, McGrory has discussed closed sessions and personally urged councilmembers to cast their votes in ways financially advantageous to the Padres.

quests and other public sources.

**1-12-98** Memo to Judy McCarty re:meeting with Larry Lucchino, John Moores, Nancy Chase re: library matters.

**1-22-98** Meeting, Christine Kehoe and Ted Roth, Padres board of directors, at Westgate Hotel.

**1-30-98** Two phone calls from Valerie Stallings to John Moores's home in Carmel, CA.

**3-27-98** Memo to Judy McCarty re: meeting with Larry

*continued on page 6*

# Such good friends

*continued from page 4*

Lucchino and John Moores — review prelim. Site plans and discuss branch libraries. Their office.

**3-27-98** Meeting, Christine Kehoe, Larry Lucchino, and John Moores re: preliminary site plan.

**3-31-98** Contribution of $1000 by Jennifer McLeod, San Diego Padres, to Christine Kehoe 1998 campaign for U.S. Congress

**3-31-98** Contribution of $1000 by Robert Jason McLeod, San Diego Padres, to Christine Kehoe 1998 campaign for U.S. Congress

**5-5-98** Meeting, Christine Kehoe, John Moores and Larry Lucchino

**5-6-98** Memo to Judy McCarty, meeting with Larry Lucchino and John Moores re: update on site plan. Your office.

**5-19-98** Reelection campaign fundraiser for Byron Wear hosted by Jennifer McLeod, daughter of John Moores. Goal: $5000.

**6-3-98** Memo from Kaye, "assistant to L. Lucchino" to Denise (Lara, an aide to George Stevens)

"Here are two sets of tickets: 10 txs in field for you and your group. 6 txs in Larry's Box — Press Level Box 26A. Larry would like you to join him for an inning in his box and have a bite to eat. See you

*continued on page 8*

# Such good friends

*continued from page 6*

there."

**6-5-98** Memo to Judy McCarty, meeting with Larry Lucchino, Kris Michell re: new ballpark renderings. Meeting requested by Donna Legrand. Apologized for short notice.

**6-5-98** Meeting, Christine Kehoe, Larry Lucchino and Kris Michell re: ballpark.

**7-13-98** Breakfast, Christine Kehoe and George Will, Padres boardmember, La Jolla Beach and Tennis Club.

**8-7-98** Letter from Judy McCarty to John Moores and Larry Lucchino.

"Dear John & Larry,

"The roses are beautiful! There's too much said for the sake of argument and too little said for the sake of agreement. Please accept my gratitude on behalf of the citizens of San Diego."

**8-19-98** Memo: "Padres have requested Judy [McCarty] to attend the Padres game and pregame introduction on Tuesday, Sept. 1st. Need to arrive at Press Gate H at 6:15 pm. Member of the Pad squad will escort Judy from the Press Gate H onto the field. Leslie has Judy's tickets for the game."

**9-28-98** Phone call from Valerie Stallings to Houston hotel.

**10-5-98** Letter from Harry Mathis to Charles Steinberg, San Diego Padres.

"Due to a comedy of errors related to attending the gala before the Saturday night [Padres] game, I was charged for two $32 tickets to the game on my Visa when I thought I was simply being charged for a ticket to the gala for my wife since my invitation covered only myself. The fault was probably mine for not questioning one of your young staff members more closely when she stopped me at gate C and took my Visa to 'get my tickets.' I thought she understood that I needed a ticket for my wife to the gala, and she apparently thought we needed tickets to the game (I had tickets to the City Box).

"It wasn't until afterward that I looked at the enclosed contents of the envelope she handed me and realized that a mistake had apparently been made. I felt like I parked my brain with my car. I don't know whether it's possible to correct the error, but rather than take it up with some unknown person in the Organization, I decided to ask you to help. Thanks for anything you can do."

**11-20-98** Phone call from Valerie Stallings to Neon Systems, Houston, TX.

**11-20-98** Phone call from Valerie Stallings to John Moores home in Carmel, CA.

**11-20-98** Phone call to Judy McCarty, Jim Madaffer (McCarty aide) from Larry Lucchino.

For the following Harry Mathis meetings, only the year of the appointments were furnished by Mathis in response to a public records act request; specific dates were blacked out:

**1998**

Larry Lucchino and Kris Michell re: Ballpark

Becky and John Moores, Moores's condominium; Meridian, downtown

Kris Michell re: Prop C

Larry Lucchino, Kris Michell, and Moores

**1-28-99** Private reception 5 p.m. for Judy McCarty, "Yes on L" event, at John Moores's home, Rancho Santa Fe.

**1-28-99** Meeting, Juan Vargas, Larry Lucchino, and Jose Mireles (Latino Builders), Padres office.

**2-8-99** Phone call, Valerie Stallings to home of John Moores, Carmel, CA.

**2-8-99** Meeting, Christine Kehoe, Larry Lucchino, and Kris Michell.

**2-12-99** Meeting, Judy McCarty and John Moores and Larry Lucchino re: ballpark.

**2-17-99** Meeting, Juan Vargas, John Moores, and Larry Lucchino.

**2-23-99** Phone call, Valerie Stallings to offices of Neon Systems, Sugar Land, Texas.

**2-23-99** Phone call, Valerie Stallings to offices of Neon Systems.

**2-28-99** Meeting, Juan Vargas and Larry Lucchino, Padres offices.

**3-1-99** Phone call, Valerie Stallings to offices of Neon Systems, Sugar Land, Texas.

**3-5-99** Neon System stock purchase, Valerie Stallings ($10,000 to $100,000).

**3-24-99** Phone call to Harry Mathis from Larry Lucchino.

**3-29-99** Phone call to Judy McCarty from Larry Lucchino, re: wanted to discuss the progress of this weekend. Urges you to vote today for "sufficient assurances."

**3-30-99** Phone call to Judy McCarty from Larry Lucchino.

**3-31-99** Valerie Stallings sells Neon Systems stock ($10,000 to $100,000).

**4-19-99** Meeting, Juan Vargas John Moores, Larry Lucchino, Tom Sullivan, and Kris Michell on downtown library.

**4-23-99** Meeting, Christine Kehoe, Larry Lucchino, John Moores, Kris Michell, and Tom Sullivan, re: Library.

**7-6-99** 2 p.m. meeting, Juan Vargas, Larry Lucchino, Kris Michell, re: ballpark update.

**7-6-99** 3 p.m. meeting, Juan Vargas and Herb Klein (*Union-Tribune* editor-in-chief), his office.

**7-21-99** Meeting, Christine Kehoe, Kris Michell, Larry Lucchino.

**8-6-99** Meeting, Christine Kehoe, Jack McGrory, and Sol Price re: their project in CH (City Heights).

**9-13-99** Meeting, Juan Vargas, John Moores, and Kris Michell.

**9-13-99** Meeting, Christine Kehoe and John Moores.

**9-20-99** Breakfast: Juan Vargas, John Moores, and Frank Urtazan (University Club).

**9-21-99** Meeting, Juan Vargas, Kris Michell, John Kratzer, and Dennis Cruzan (Padres) re: hotels.

**9-23-99** Juan Vargas, Dinner Tribute to Larry Lucchino, La Jolla Hyatt Regency. Check-in at the door. They will show you to your table.

**9-25-99** Letter, Kris Michell to George Stevens.

"Once again, I find it appropriate to express my appreciation for taking time to allow our development team to continuously update you on the progress of the Ballpark District."

CITY LIGHTS CITY LIGHTS CITY LIGHTS CITY LIGHTS

**9-28-99** $1000 contribution made by Larry Lucchino to Juan Vargas 2000 Assembly campaign.

**9-29-99** $1500 contribution made by Latino Builders to Juan Vargas 2000 Assembly campaign.

**10-21-99** Meeting, Juan Vargas, Kris Michell, Charles Black, Dave Nielsen, and Allan Hynie, re: EIR update.

**11-5-99** Meeting, Juan Vargas, Kris Michell, and Jose Mireles. Getting Latino Builders involved in downtown/ballpark contracting.

**11-22-99** Meeting, Juan Vargas, Jack McGrory, Kris Michell, re: Qualcomm (Stadium) Lease Extension.

**11-26-99** Valerie Stallings purchases Neon Systems stock ($10,000 to $100,000).

**12-13-99** Memo to Judy McCarty, meeting with Larry Lucchino re: ballpark, your office.

For the following Harry Mathis meetings, only the year of the appointments were furnished by Mathis in response to a public records act request; specific dates were blacked out:

**1999**

Kris Michell, Jack McGrory re: Qualcomm lease extension

John Moores, Larry Lucchino, Ballpark update

John Moores, Tom Sullivan, re: Library update

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Larry Lucchino, Kris Michell re: Ballpark update

Ballpark update with Kris Michell, John Kratzer, JMI, Dennis Cruzan, Burnham re: ancillary development.

Private baseball model preview, Padres Mission Valley office

**1-7-00** Meeting, Christine Kehoe, Larry Lucchino, Jack McGrory and Kris Michell re: Ballpark Permanent Financing.

**1-11-00** Meeting, Juan Vargas, Larry Lucchino, Jack McGrory, and Kris Michell, update you on ballpark.

**1-21-00** Meeting, Christine Kehoe and John Moores.

**1-24-00** Phone call to Harry Mathis from Jack McGrory.

**1-25-00** Phone call to Harry Mathis from Larry Lucchino.

**1-26-00** Meeting between Judy McCarty and Larry Lucchino, Jack McGrory, Kris Michell re: brief on next hearing on ballpark.

**1-28-00** Meeting, Christine Kehoe, Ted Roth, Jerry Butkiewicz re: ballpark.

**1-28-00** Meeting, Christine Kehoe, Larry Lucchino, Jack McGrory, Kris Michell.

**2-26-00** Juan Vargas: attend Ireland Fund Dinner, Hyatt Downtown. Jack McGrory invited you.

**3-3-00** Campaign contribution of $500 by Jack McGrory to Juan Vargas 2000 campaign for state assembly.

**4-19-00** Meeting, Judy McCarty and Larry Lucchino and Jack McGrory re: Ballpark update.

**4-20-00** Meeting, Juan Vargas, Larry Lucchino, and Jack McGrory (Grant Grill — gift $20.58) Update you on ballpark.

**4-20-00** Meeting, Christine Kehoe, Larry Lucchino, and Jack McGrory re: Ballpark update.

**5-11-00** Phone call from Jack McGrory to Christine Kehoe re: ballpark closed session on Monday.

**5-22-00** Phone call to Harry Mathis from Jack McGrory re: FYI Today there will be a press conference at 11:30 at Hall of Justice re the Ballpark lawsuit.

**5-25-00** Memo to Judy McCarty re: Jack McGrory interim financing update. Jack will call Judy at home.

**5-25-00** Meeting, Christine Kehoe and Jack McGrory.

**6-23-00** Memo, Jack McGrory to San Diego City Council.

"We are requesting that Supplemental Item 2403 authorizing the expenditure of $3.8 million from the Ballpark Major Facility Fund...be trailed from Monday, June 26, to Tuesday, June 27, so that we can adequately prepare for this important discussion."

**6-23-00** Meeting, Christine Kehoe, Larry Lucchino, and Jack McGrory.

**6-28-00** Letter from Julie Meier Wright, President, San Diego Regional Economic Development Corporation, to George Stevens:

"June 27 was a great day for San Diego! Thank you for your gutsy vote to continue the partnership on the ballpark and redevelopment district. I believe that it was a sound decision to continue the project as it passes its latest 'bump in the road.' In the litigious, adversarial environment that confronts political leaders everywhere, the willingness of public officials to stay the course is important to keeping important projects on schedule and on budget."

continued on page

CITY LIGHTS

# Such good friends

*continued from page 10*

**6-28-00** Letter from Byron Wear to Mike Dee, San Diego Padres re: Baseball Museum Americana at the Ballpark:

"I had an opportunity to talk with Garth Kinsell from Power Play Sports regarding the new Baseball Museum Americana that they will be setting up at the Park of the Park area. After reviewing the proposal I think that the idea would be very successful for San Diego and especially the Padres.

"The quality of the museum and the exhibits that PowerPlay Sports has set up in the past throughout the country have all been highly successful. The Baseball Museum would draw tourists and locals to the Park of the Park area in large quantities, as well as enhance the new ballpark, bringing all of these benefits to the Padres as well. They have had a few meetings with Al Corti to date, but I think it would be advisable for you to give Garth Kinsell a phone call...and possibly set a meeting with them as well."

**7-14-00** Phone call to Harry Mathis from Jack McGrory re: Environmental lawsuit against ballpark to be heard in (city council) closed session.

**8-15-00** Memo from Luis Natividad, aide to Councilman George Stevens, to Stevens. Subject: Reporting donation from Mr. Larry Lucchino.

"Councilman, this is to informed [*sic*] that Mr. Larry Lucchino to help pay personal expenses while on medical leave in the hospital, recuperating from cancer surgery. The check No. is 1075 Glendale Federal Bank, La Jolla Branch, dated 5-28-98 for the amount of $500."

For the following Harry Mathis meetings, only the year of the appointments were furnished by Mathis in response to a public records act request; specific dates were blacked out:

**2000**

Ballpark update, new model, Padres Mission Valley office

Fred Bernowsk and Doug Wilson, re: ballpark

SD Padres Opening Day VIP reception, Club Lounge, Club Level 1-A

Larry Lucchino, Jack McGrory, Ballpark update

Tour of ballpark, downtown

**4-23** (no year provided) Phone call for Byron Wear from Jack McGrory re: Ballpark.

**6-23** (no year provided) Phone call for Byron Wear from Larry Lucchino re: Ballpark. ■

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# One Team, Countless Corporations

By Matt Potter

Who really owns the Padres? That question has remained unanswered since John Moores and Larry Lucchino proposed in 1996 that San Diego city taxpayers subsidize the team's venture to build a downtown baseball stadium. The team has maintained that Moores, a computer mogul from Houston, and Lucchino, a lawyer who is a partner in the Washington, D.C., firm of Williams and Connolly, are the ball club's principal owners. But the ownership trail ends there, at least as far as the public knows.

City officials, who when asked for documents in the city's possession that identify the team's ownership, say they don't have any records about it and have never asked for the information. The team is officially owned by Padres, LP, a Delaware limited partnership, but that's all the information legally available to the public. A courtroom attempt by attorney Bruce Henderson to require that the city council find out who is behind the team was turned aside by Superior Court judge Mac Amos, who ruled that ordinary citizens cannot compel the city council to find out who owns the team. The council has consistently refused to do so on its own.

Earlier this year, three state appellate court judges -- Richard Huffman, Gilbert Nares, and Daniel Kremer -- upheld Amos's ruling that Henderson's client, a local citizen, had no right to enforce a city charter section requiring that the city council find out the ownership of the companies it deals with. "To the extent Charter section 225 grants the city council discretion to decide that further disclosure should or should not be required, we are not in a position to dictate that such discretion should be exercised in any particular way," the judges averred. "Finally, this Charter section does not appear to have been adopted to create a private right of action by disgruntled citizens to torpedo measures with which they disagree."

For the time being, that appears to be the final word on finding out more about who owns the baseball team. But there is more to the downtown stadium project than the stadium. As part of its deal for the stadium, the city gave Moores development rights to a swath of the east side of downtown, about 26 blocks. Acting as the redevelopment agency, the city council has been condemning property both within and outside the footprint of the stadium, to be provided to Moores at subsidized prices.

In addition to the stadium and its so-called "Park at the Park," a commercial development in back of the baseball field, Moores has been given development rights and subsidized real estate for three hotels and an office building. In February, the new city council, chaired by Mayor Dick Murphy, who during the election cast himself as a ballpark skeptic, voted unanimously to allow Moores to move ahead with a 512-room "Westin Park Place" hotel and condominium complex at the corner of Sixth Avenue and L Street. At the time of the council vote, the Union-Tribune quoted deputy city attorney Leslie Girard as saying, "This

hotel will go through whether or not the ballpark goes forward," because the rooms were "desperately needed."

The approximately one-block site of the hotel is on property acquired from the city's old-line Frost family in a condemnation action last December for about $6 million, according to a report in the Union-Tribune. City documents show that the Moores venture, called JMI Realty, Inc., will pay only about $2 million in cash for the land. The rest of the cost is being picked up by city taxpayers as part of the ballpark project.

Last September, Moores and his JMI Realty, Inc., announced they had lined up a $104 million loan from Bank One of Chicago and West-deutsche Landesbank Girozentrale of Germany. The balance of the financing for the development, which JMI said would cost a total of $148 million, was not disclosed.

On the strength of that announcement, the city council agreed to allow Moores to begin construction on the project without acquiring ownership of the property. In a so-called "Foundation Right of Entry Agreement" dated last December, JMI Realty was allowed to begin construction of what was billed as "foundation only improvements," including "garage slab-on-grade, garage structural wall and column system, and wall waterproofing systems."

Pam Hamilton, who is managing the project on the city's side, says that in return for the right of entry, JMI agreed to post a $400,000 "letter of credit" to provide sufficient funds to remove the foundation work just in case the developer failed to carry through with the project. Since beginning construction, the project has grown from a huge hole in the ground to an expensive-looking, four-story structure of concrete and reinforcing steel, encased in wooden forms. Hamilton says that all the work onsite to date is permitted under the foundation entry agreement. According to Hamilton, the project had been coming along nicely.

But last week, construction suddenly ground to a halt, and JMI announced that it was suspending the operation until the city came up with the cash to build the adjacent baseball stadium, on hold since last spring, when it came to light that then-city councilwoman Valerie Stallings had accepted gifts and stock tips from Moores. "Unfortunately, it is difficult to proceed much further with construction at this time because doing so requires coordination with multiple ballpark-related projects, such as a parking facility next door and a District Central Cooling Plant -- projects that will need to be redesigned or not built at all if there is no ballpark," according to a JMI news release. It turned out that the much-heralded bank loan JMI had announced for the project had never been made.

That move seemed to some observers as though JMI and Moores had left city taxpayers once again holding the bag, in that the land has never been sold to JMI and that the construction work on the project to date seems far too elaborate to be taken down for just $400,000, the amount of the JMI letter of credit. The city's Hamilton says not to worry, that the redevelopment agency's right-of-entry agreement with JMI requires that JMI Realty, along with its parent, JMI Services, make good on any expenses arising from the project's shut-down.

But who is behind Moores and his JMI companies? According to agreements between the redevelopment agency and the companies, JMI Realty is entirely owned by JMI Services, which in turn is wholly owned by Moores and his wife Rebecca. Both JMI entities are Delaware corporations. The city's agreement with JMI Realty allows it to syndicate its interest in the hotel venture, as well as the other taxpayer-subsidized stadium-related projects, as long as it discloses the identity of the new investors to the city. The agreement also requires JMI to continue to stand behind the project financially. Under terms of the deal, the city shall not "unreasonably refuse" its approval for JMI-requested changes of ownership.

So far, says Hamilton, JMI has not made any disclosures of new ownership. But, she notes, such filings would not yet be required because the so-called "disposition and development" agreement between the city's redevelopment agency and JMI has not yet gone into effect. The construction work to date, she points out, has been covered only by the interim "right-of-entry" agreement, and JMI has not yet paid for the land or taken legal title to it. "We have not closed the financing and conveyed the property yet. As part of the closing, we will know where the equity dollars are coming from."

A hint as to from where those new investors might be gleaned was provided in February 2000, when JMI announced that Legg, Mason, Wood, Walker, a Baltimore-based investment-banking firm, would act as "financial advisor and exclusive placement agent for the Padres in connection with the downtown Ballpark and Redevelopment Project." The company contact for the deal was said to be John A. Moag, Jr., the former chairman of the Maryland Stadium Authority.

Beginning last spring and summer, yet another clue to the ultimate ownership of the Moores-related downtown development ventures emerged when John C. Kratzer, president of JMI Realty, began registering what has become a total of 20 Delaware limited liability companies, many of which appear to have a direct relationship with the downtown development.

Each of the companies begins with the name JMIR and include JMIR-B Parcel; JMIR-Campus at the Park Manager; JMIR-Campus at the Park; JMIR-Central Plant Ground Lessor; JMIR-Central Plant Ground Lessor Manager; JMIR-D Parcel; JMIR-Downtown Acquisition; JMIR-Downtown Acquisition Manager; JMIR Guaranty Company; JMIR-Master Development; JMIR-Produce Acquisition; JMIR-Produce Acquisition Manager; JMIR-San Diego Harbor Hotel Company Manager; JMIR-San Diego Harbor Hotel Company; JMIR-San Diego Suites Hotel; and JMIR San Diego Suites Hotel Manager.

The latest JMIR entity, JMIR-San Diego Condo Company, state records show, was registered this March 20 by Karen E. Trimble, its "organizer/authorized person."

On August 10 of last year, according to county records, JMIR Acquisition, LLC, purchased for $24 million approximately eight blocks in the ballpark area from San Diego Gas and Electric. According to a trust deed recorded at the same time, San Diego National Bank lent the company $17 million for the purchase. The city's Pam Hamilton says that she is not aware of the firm or the identity of its owners. The city is ultimately slated to buy the land as

part of its deal to subsidize the baseball stadium but has no ownership-disclosure requirement as part of that transaction.

According to a document signed by Kratzer and filed with the California Secretary of State's office, the JMIR entities are wrapped together in a byzantine web of interlocking ownerships. For instance, JMIR-Downtown Acquisition, LLC, is managed by JMIR-Downtown Acquisition manager, "its sole manager," which in turn is managed by JMIR-Master Development, LLC, its "sole and managing member." JMIR-Master Development is in turn managed by JMI Realty, Inc., "its sole and managing member."

But the complexity doesn't stop there. Shortly after the JMIR companies were formed last year, many of them filed a so-called "Form D" with the federal Securities and Exchange Commission. According to those filings, individual shares in many of the JMIR companies have been sold to unidentified investors for just a dollar apiece.

For example, according to the Form D for JMIR-Campus at the Park, dated August 19, 2000, 11 individual investors paid a grand total of $11 for their "limited liability company membership interests." The $11 was earmarked for "working capital," the filing says. It is signed by Kratzer, who is listed as "President of JMIR-Campus at the Park Manager LLC as Manager of JMIR-Campus at the Park LLC."

Similar forms, showing sale of 11 ownership interests in each limited liability company, are on file for JMIR-Downtown Acquisition, JMIR-Harbor Hotel Company, and JMIR-San Diego Suites Hotel, among others. The city's Hamilton says she's not aware of any of these transactions but that they do not concern her. "John Moores can either put all the equity into the project himself, or he could bring other investors into it. His financial statements have been provided to our attorneys, who have assured us his financial equity is strong and that's what matters to us."

Epilogue

Late last week, Sempra Energy Solutions, a subsidiary of the utility giant Sempra Energy, sued JMI Realty, Inc., and 50 anonymous defendants in San Diego Superior Court, alleging that JMI owes Sempra $142, 629.47 worth of "design and engineering services." Sempra alleges that the work was done in conjunction with an agreement for a "Ballpark Project Chilled Water District Plant," which JMI canceled in September of last year.